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NOTES OF INDIAN CASES.

MUNICIPAL CORPORATION OF RANGOON *v.* PAZUNDAUNG BAZAAR CO., LTD., I.L.R. 8 Rang. 143.

On the assumption that public bodies would exercise the powers given to them reasonably, the legislature has in many cases vested in them a large discretion in several matters. But cases have often arisen where that discretion has been misused —it may be for assumed public benefit—and the Courts have been called upon to interfere. In the case under discussion the Court declined to interfere with the discretion of the Corporation in fixing a particular fee for licenses on markets on the ground that "the Court has no right to interfere until it is established that the fee so fixed is so unreasonable as to be illegal," the burden of proving that it was excessive being thrown on the subject. Lord Herschell, L.C., points out in *Institute of Patent Agents* v. *Lockwood*[1] that where there is the power in a Corporation to impose fees at all, and the Corporation sanctioned a particular fee, it would not be "an improvement upon the scheme of legislation which gave power to fix fees if those fees were made subject to the control of the Judges according to their views of what fees were reasonable or unreasonable." See also *Duke* v. *Rameswar Malia.*[2] In *Corporation of Madras* v. *Spencer & Co.*[3] the Court interfered with the levy of a fee on the ground that "it was not done with a view to pay for the expenses in connection with such licenses, but also obviously done to increase the revenue of the Corporation from liquor" and "as a counter-demonstration to the order of Government

1. (1894) A.C. 347 at 355. 2. (1899) I.L.R. 26 C 811 at 815.
3. (1929) I.L.R. 52 M. 764: 57 M.L.J. 71.

refusing to allow the Corporation to take the abkari revenue of the City"; but the Court declined to decide what the reasonable fee would be, as it would amount to the Court taking upon itself the power conferred by the Act upon the Council. The *ratio decidendi* of these cases is that the Council is empowered only to collect a fee and not a tax and if the extent of the fee is such as to lead to the inference that it is "a tax in disguise" then the fee is *ultra vires* the Council. The errors in assessment are not then irregularities merely but such as go to the ground-work of the tax, and may be reviewed by the Civil Court. (See *per* Mookerjee, J., in *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar*[4].) The Court has interfered where the public bodies have exercised the powers vested in them for ulterior purposes or in a capricious or arbitrary manner (see *Taluk Board, Bandar* v. *Zamindar of Chellapalli*,[5] and *In re Manick Chand Mahata* v. *The Calcutta Corporation and the Calcutta Improvement Trust*[6]). Abdur Rahim, J., observes in *Taluk Board, Bandar* v. *Zamindar of Chellapalli*[5] that "where it is clear that a discretionary power has been exercised in a manner which could not have been in the contemplation of the legislature, then the Court has undoubtedly jurisdiction to interfere."

4. (1908) I.L.R. 35 C 859 at 866.
5. (1920) I.L.R. 44 M. 156 at 160 : 40 M.L.J. 91.
6. (1921) I.L.R. 48 C. 916.

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NOTES OF RECENT CASES.

Jackson, J. Cr. A. No. 391 of 1930.
27th November, 1930.

Indian Penal Code, S. 387—Offence triable by assessors—Tried by Jury—Effect on the right of appeal.

If an offence triable by assessors is erroneously tried by Jury, the accused has a right of appeal on facts, treating the charge to the Jury as the judgment, and the verdict of the Jury as the opinion of the assessors.

26 Mad. 243 (*n.*): 6 M.L.J. 14 followed.

25 Bom. 680 distinguished.

V. L. Ethiraj and *M. Sriramamurti* for Appellant.

The Public Prosecutor for the Crown.

S.V.V.

Jackson, J. C.R.P. No. 691 of 1929.
28th November, 1930.

Civil Procedure Code (V of 1908), Order 2, rule 2—Subscription to chit fund payable in instalments—Whole amount recoverable on default—Suit filed after default to recover part of amount due—Subsequent suit for balance—Bar.

The plaintiff claimed as the assignee of a Karaswan's right in a chit fund, the subscriptions payable in a number of instalments by the defendant. By a document executed by the defendant in favour of the Karaswan, he made himself liable to pay all the future instalments at once in case he made default in the payment of any one instalment. The defendant having committed default the plaintiff sued him to recover a portion of the amount that had become payable and obtained a decree. Subsequently he brought another suit for the balance still due.

Held, that the later suit was barred by O. 2, R. 2, Civil Procedure Code.

(1929) M.W.N. 204 followed.

A. Swaminatha Aiyar for Petitioner.

K. Balasubramania Aiyar for Respondent.

B.V.V.

Madhavan Nair, J. S.A. No. 1583 of 1927.
1*st December,* 1930.

Fraud—Suit to set aside decree for fraud—Wilful suppression of fact which it was the duty of plaintiff to disclose—Defendant remaining ex parte—*Court, if can set aside the decree.*

Where a party obtains a decree in a suit in which the defendant is *ex parte* by deliberately putting forward a false case before the Court and by misleading it by suppressing a fact which it was his duty to disclose to the Court, such a decree cannot be set aside in a subsequent suit on the ground of fraud practised upon the Court by putting forward a case false to the knowledge of the plaintiff.

18 C.W.N. 447; 63 I.C. 712; 23 I.C. 976 followed.

Cases like 38 Mad. 203, 41 Mad. 743 where material evidence was suppressed or perjured evidence given distinguished.

Case-law discussed.

The unquestioned jurisdiction of a Court to set aside a decree on the ground of fraud is to be exercised with care and reserve.

41 Cal. 990 referred to.

P. Venkatramana Rao for Appellant.

P. Somasundaram for Respondents.

S.V.V.

RAJ NARAIN RAO *v*, RAM SARUP, I.L.R. 52 All. 481.

It is one thing to say that Art. 64 (Limitation Act) applies to a particular case but it is quite another question as to how far on this kind of action the account stated can be gone behind to show that a portion or whole of the claim forming the subject-matter of the account stated was barred at the time of the statement of accounts and as such could not be sued upon. It is not necessarily involved in this kind of action that there should be cross-demands and settlement of the same. *See* 7 Hals. 489. When there are cross-demands, then the statement of account amounts to a new contract and although the demand or demands on one side are barred, suit can be maintained on the statement of accounts. If, however, the demands are all on one side, and only payments on the other the statement of account can save the bar of limitation of the original claim only if it could be read as an express promise to pay. An account stated as such may not amount to such promise but the words used might be such as to amount to a promise. All that *Manjunatha Kamti* v. *Devamma* alias *Gomathiamma*[1] decided was that to bring a case within Art. 64 as an account stated, it is not necessary that there should be cross-demands; it does not decide that such an account stated will save barred items. That is quite a different question. In England *an account stated* has got no special period of limitation prescribed. It has to operate as a new promise with consideration in which case there would be a new debt and a new period of limitation which will be the case when there are cross-demands or it may operate as an acknowledgment which will be of use only when it is signed or it must be used as a payment in which case also writing is not necessary under the English Acts of Limitation. Where the account stated could be used as an acknowledgment or part payment in England there is no trouble even though at the time of the statement the original claim is barred as under the English Statutes acknowledgment or part payment need not be before the expiry of the period of limitation. In India having regard to the fact that account stated is specially provided for it would seem to follow that even though you have cross-demands, Art. 64 would govern and limitation would be saved only if there is writing. *Amuthu* v. *Muthayya*[2] and *Murugappa Chetty* v. *Vyapuri Chetty*[3].

1. (1902) I.L.R. 26 M. 186 at 187

2. (1892) I.L.R. 16 M 339. 3 (1916) 32 M.L.J. 536.

There are some cases in India which hold that where there is an oral settlement of accounts the article applicable would be Art. 115 on the ground that the 3rd column of the article must control the first. *Jahm Singh Srimal* v. *Choonee Lal Johurry*[4] and *Murugappa Chetty* v. *Vyapuri Chetty*[5]. This way of dealing with the article may not be quite legitimate. This is not tantamount to saying that an oral settlement does not give rise to a cause of action. *Marimuthu* v. *Swaminatha Pillai*[3] and *Mussammat Jawai* v. *Hussain Baksh.*[6] It may give rise to a cause of action and yet the benefit of Art. 115 may not be available. In the case under review the Court notes that the preponderance of view is in favour of the position that Art. 64 applies only to cases of cross-demands (*Jamun* v. *Nand Lal*[7] and *Suraj Prasad Pandey* v. *Raghunath Patnaik*[8]) but it was not necessary to decide that point in the case as in this case there was no settlement of accounts between the parties with mutual concurrence. When there is no such concurrence, their Lordships held there could be no account stated within the meaning of Art. 64. An account though purporting to be an account stated and signed by the defendant could be used in such circumstances only as acknowledgment or a payment which in this case could not save the claim as both these things took place only after the expiry of the period of limitation. The further question in this case was as to whether the fact that interest was being added to the principal in accordance with the original agreement in the creditor's books could make such addition a payment of interest within the meaning of S. 19 of the Limitation Act. Their Lordships hold that such initial agreement would not make it payment within the section unless there was consent each time the addition was made.

RAJA AJAI VERMA *v.* BALDEO PRASAD, I.L.R. 52 All. 536.

In Allahabad there seems to be the practice of sending for pleaders before dismissing an appeal for default. This practice is followed even in the High Court and their Lordships observe that this is a salutary practice and should not be discontinued for they say "in appeals especially it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsel in Court, counsel would

4 (1911) 15 C.W.N. 882. 5. (1897) I.L R. 21 M 366
6 (1921) I.L.R 3 Lah. 80 7 (1892) I.L.R. 15 A 1
8 (1920) 5 Pat. L.J. 371

be busy in several Courts and it is conducive to good work that they should be sent for". It would be desirable that in other parts of India also, this salutary practice is adopted in recognition of the elementary principle that the Courts are not for discipline but for administering justice.

JOKHU BHUNJA *v.* SITLA BAKHSH SINGH, I.L.R. 52 All. 539.

Two mortgages were created on a land, the earlier being a usufructuary mortgage, the later a simple one. The later contained a clause that the mortgagor would not be entitled to redeem the earlier mortgage without redeeming the later. The question was whether the mortgagee was entitled to insist upon the later mortgage being redeemed when the suit on that mortgage was barred by limitation. On this question there seems to be considerable difference of opinion. The case under review holds that that circumstance is immaterial. In *Sultan Muhammad* v. *Ladha Singh*[1] the Lahore Court also takes the same view, dissenting from *Kesar Kunwar* v. *Kashi Ram*,[2] which took the contrary view. The argument on one side is that the covenant is good, limitation only bars the remedy and not the right and that limitation applies only to suits and not to defences. The argument on the other side is that the covenant is to be construed only as a covenant to pay subsisting and enforceable mortgages and not a covenant to pay even barred mortgages, and even if there should be such a covenant it is unenforceable. Now, it is perfectly clear that according to all authorities the defence would be available in respect of payments connected with the mortgage transaction either as an amount that can be taken account of at the time of redemption, *Parasurama Pattar* v. *Venkatachalam Pattar*[3], or as a part of the mortgage money secured by the same document, *Nathamuni Pillai* v. *Vengammal*[4]. On principle it would follow that if the effect of the later transaction is to make the second mortgage amount a part of the same transaction as the previous the same result must follow. *A fortiori* it would seem to follow if the usufructuary mortgage itself provides that the mortgage could be redeemed only with the other mortgages and not apart, the effect of the clause being to make the land security for further advances. A provision in the second mortgage that the amount of the second

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1 A.I.R. 1926 Lah 633
2. (1915) I.L.R. 37 A. 634
3 (1913) 25 M.L.J. 561
4. (1917) 5 L.W. 593.

mortgage is payable along with the first and that the first could not be redeemed apart from the second would, it is conceived, amount to such a consolidation though the amount could have been sued for after the due date of the first mortgage and such a suit might be barred after 12 years. Again, is it not permissible to provide in a document two periods of payment one on one date and another on a contingency such as redemption of an earlier mortgage. It may not be open to a party to agree not to plead limitation but there is nothing against providing diverse starting points for limitation by inserting suitable covenants. It must also be noted that the exclusion of the later mortgage in *Kesar Kunwar* v. *Kashi Ram*[2] was not by reason of any specific rule of limitation but by the application of the spirit or the analogy of the Act or perhaps by applying the rule that Equity must follow the law. If a rule of law could be got round by some legerdemain in drafting without effecting the substance of the transaction, a suspicion legitimately arises as to the correctness of the rule and we think, judged from this test, the ruling under review and the Lahore ruling are more satisfactory than *Kesar Kunwar* v. *Kashi Ram*[2]. The Madras rulings in *Ramakrishna Kukkilaya* v. *Nekker Kuppanna*[5] and *Manjeshwar Naraina Rao* v. *Shiva Rao*[6] do not go as far as *Kesar Kunwar* v. *Kashi Ram*[2], no covenant like the one in the case under review being in question there.

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2. (1915) I.L.R. 37 A 634.
5. (1917) 33 M L.J. 581.
6 (1918) I.L.R. 41 M 1043: 35 M.L.J. 414.

MUKTAKESHI DASI *v.* MANILAL JANA, I.L.R. 57 Cal. 371.

In this case, the plaintiff had instituted a prior suit for rent against the defendant in which the latter contended that the land belonged to a third person and he held under that third person. That question was gone into in the rent suit and the Court held that the title was in the third person and the defendant held under him and the suit was dismissed. Subsequently, the present suit was brought by the same plaintiff alleging his title against the same defendant for ejectment but subsequently gave up his claim for possession and only asked for the settlement of a fair and equitable rent of the same land when the defendant set up the finding in the previous suit as to the title of the third person as a bar on the rule of *res judicata* and the High Court has held on the strength of a number of previous rulings that there is no bar.

While it must be recognised that the decision under notice is supported by the cases referred to, the question is not altogether free from difficulty, especially as the learned Judges themselves have held that if the defendant had set up his own title in the prior suit and succeeded in it, it would bar the later suit on title. The learned Judges would also hold that if in the prior suit the tenant had set up a third person's title and failed, the decision would be *res judicata* in a subsequent suit on title. It may at once be taken as settled that it cannot be said that a finding as to title in a rent suit will never be *res judicata* for the purpose of a subsequent suit based on title. See *Radhamadhub Holdar* v. *Monohur Mukerji*[1] and *Panchu Mandal* v. *Chandra Kant Saha*[2]. If this is accepted, where a previous suit for rent was dismissed one of the grounds for the dismissal being that the land belonged to a stranger and not the plaintiff and the defendant held under the stranger, it is difficult to see how the finding on the issue which really goes to support the decree in the rent suit which is not given in spite of the finding, can be said to be one which is only incidental and not one on a matter directly and substantially in issue. Where the findings on any one of the issues will support the decree, it has been held by the Calcutta and the Madras High Courts that in such cases the findings on all those issues will be *res judicata* in a subsequent suit. See

1. (1888) L.R. 15 I.A. 97: I.L.R. 15 C. 756 (P.C.).
2. (1909) 14 C.L.J. 220.

Peary Mohun Mukerjee v. *Ambica Churn Bandopadhya*[3]; *Rambehari* v. *Surendra*[4], *D. Narain Roy* v. *Jogeschandra*,[5] *Taritbarani Dasi* v. *Basumati Devi*,[6] *Venkayya* v. *Narasamma*,[7] *Venkataraju* v. *Ramanamma*[8] and *The Secretary of State for India* v. *Maharajah of Venkatagiri*[9]. We have referred to such a large number of cases only because the Allahabad High Court has held otherwise in *Shib Charan Lal* v. *Raghu Nath*[10] and *Jiwa Ram* v. *Kalyan*[11] to the effect that where findings on several issues support the decree, only those findings which should have been logically decided first are *res judicata* for a subsequent suit. If, therefore, the finding in favour of the third person's title was one of the findings on which the first suit for rent was dismissed, it would seem to be a material issue and its decision would be *res judicata* for a subsequent suit between the same parties. That a finding to operate as *res judicata* need not necessarily have been the basis of the previous decree was pointed out in *Taritbarani Dasi* v. *Basumati Devi.*[6]

HURRYBUX DEORA *v.* JOHURMULL BHATORIA, I.L.R. 57 Cal. 386.

In this case the question arose about the limits of the rule that a party who takes a benefit under an order cannot question it. The principle of the decisions has been based on the rule against a party being allowed to approbate and reprobate in respect of the same matter. *See* Halsbury's Laws of England, Vol. XIII, S. 508, page 364. The learned Judges have pointed out in this case that the rule has no application to a case where a person claims a larger amount but gets only a judgment for a small sum and costs and he draws this amount under the directions of the Court; in such a case the person so drawing out is not precluded from appealing against the order and claiming the larger amount therein. The rule and its limits have come up for decision in the Madras High Court in two recent cases, viz, *Ramaswami Chettiar* v. *Chidambaram Chettiar*[12] and *Venkatarayudu* v. *Chinna Ramakrishnayya*[13]. In the latter case, the learned Judges have made observations in similar terms as those in the decision under notice and have

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3. (1897) I.L R. 24 C 900.
4 (1913) 19 C.L.J. 34.
5. A.I.R. 1924 C 600
6 A.I R. 1925 C 985.
7 (1887) I.L.R. 11 M 204
8. (1913) I L.R 38 M 158.
9 (1916) 31 M.L.J. 97
10 (1895) I.L.R. 17 All 174.
11. (1911) 8 A.L.J 409
12. (1927) 26 L.W. 527.
13. (1929) 58 M.L.J. 137.

approved of the decision in *Jogendra Nath Banerjee* v. *Khoda Buksha Biswas*[14], which the learned Judges in the present case have followed.

TARUNCHANDRA GHOSH, *In re*, I.L.R. 57 Cal. 533.

The decision of the learned Judge in this case is one of far-reaching importance. The question before the Court was whether the High Court has power to appoint a guardian for a minor not being a European British subject who is not resident within the limits of the Ordinary Original Jurisdiction of the Court and the learned Judge has after some examination of the Charter of the Supreme Court and the Letters Patents, come to a halting conclusion that the High Court has the power and that such power has been saved by section 3 of the Guardians and Wards Act. Though some observations on the point in In re *Shannon*[15] and In the matter of *Sirish Chander Singh*[16] have been referred to by the learned Judge, it is somewhat strange that the attention of the learned Judge was not drawn to a direct decision on the question in *Annie Besant* v. *Narayaniah*,[17] where two benches of the Madras High Court came to the same conclusion after an exhaustive examination of the case-law, the Charter of the Supreme Court and Letters Patents. Though the Madras case was taken on appeal to the Privy Council and the decision of the High Court was reversed by the Privy Council, the conclusion of the High Court that the power of the High Court extends even to cases of minors outside its Ordinary Civil Jurisdiction is not affected by the decision of their Lordships which was rested on other grounds and the point under discussion was expressly left open. We may perhaps notice, though the matter has no direct bearing on the question under consideration, that a Full Bench of the Madras High Court has held that, notwithstanding the provisions in the Criminal Procedure Code, the High Court has the power to issue writs of *Habeas Corpus* outside the limits of its ordinary jurisdiction *See* In re *Govindan Nair*[18]. Reference may also be made to In re *Nataraja Aiyar*[19] where one learned Judge held that a writ of *Certiorari* can be issued by the High Court beyond such limits, a view which has since been accepted and followed.

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14 A.I.R. 1924 Cal 380

15 (1870) 2 N.W.P.H.C.R. 79. 16 (1893) I.L.R. 21 C 206

17 (1913) 25 M.L.J. 661

18 (1922) I.L.R. 45 M. 922 43 M.L.J. 396 (F.B.).

19 (1912) I.L.R. 36 M. 72: 23 M.L.J. 393.

BALU HARSHET *v.* SHRIKRISHNA GOVIND, I.L.R. 54 Bom. 331.

One of the points laid down in this case is that no appeal lies under clause 15 of the Letters Patent against an order of a Judge of the High Court in second appeal refusing a declaration that the case is a fit one for appeal. The learned Judges have come to this conclusion on *a priori* considerations and without reference to the prior decisions on the same or a similar question. It may be useful to notice that a Bench of the Madras High Court has come to the same conclusion after a careful review of the decisions on the point. See *Ramanayya* v. *Kotayya*.[1]

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1. (1929) I.L.R. 52 M. 952: 57 M.L.J. 398.

KUMAR ABHAYANAND SINGH *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH, I.L.R. 9 Pat. 314.

The only remark we have to make about this judgment is that as the language of the section is so clear, it is unnecessary for the Judges to have written an elaborate judgment. The Calcutta High Court has needlessly got itself into difficulties by ignoring the simple procedure provided by the Code. Wherever there is a compromise under O. 21, R. 3, the Court is bound to record it if it is satisfied as to its truth and lawfulness and then pass a decree in accordance with it. Wherever there is a dispute as to the fact or lawfulness of the alleged compromise the Court is bound to make an enquiry and record it or refuse to record it. An appeal under O. 43, Civil Procedure Code, is provided against such an order. There can be no appeal against the decree passed in accordance with the order recording the compromise. If in appeal the order is reversed the decree will automatically go. This is the view that the Madras High Court has taken in a number of cases and it is fully justified by the scheme and language of the Code. There is nothing in O. 23, R. 3 to prevent the Court from postponing for sufficient cause the passing of a decree in accordance with the compromise.

TENGAROO SUKUL *v.* CHATHU BHAR, I.L.R. 9 Pat. 347 (S.B.).

The Special Bench has overruled the decision in *Ramji Ram* v. *Banshi Raut*[1] where Justice Jwala Prasad made an attempt against the *cursus curiae,* to take out the "zirat" lands of the proprietor altogether, from the scope of the Bengal Tenancy Act (VIII of 1885). He held that notwithstanding the language of S. 116 of the Act, no occupancy rights can accrue in the zirat lands. His explanation of the concluding portion of S. 116 which expressly excluded only such of the zirat lands "as were held under a lease for a term of years or under a lease from year to year," was that it was inserted only by way of abundant caution to prevent confusion with the rights of a raiyat in respect of raiyati lands and that the Legislature needed only to make that point clear beyond doubt. This is of course a somewhat halting explanation and is not particularly convincing when it is remembered that similar language has been used from 1859 onwards and in a series of decisions it had been laid down by different Judges that the section operated to restrict the class of cases of zirat lands wherein the

1. (1924) I.L.R. 4 Pat. 89.

accrual of occupancy rights was prohibited. Some support was sought to be given for the view of Jwala Prasad, J., from the decision of the Privy Council in *Mahant Jagarnath Das* v. *Janki Singh*[2] but that decision merely related to the question of limitation with reference to tenants who held over after the expiry of the term under the registered lease of zirat lands. The present question could hardly be said to have been raised in that case. No doubt the somewhat wide observation of the Privy Council in *Raja Dhakeshwar Singh* v. *Gulab Kuer*[3] that "in these lands (private lands of the Zamindar) the raiyat cannot acquire a right of occupancy" may be invoked in support of the above view of the learned Judge. But the point was hardly discussed by their Lordships and the context shows that it was only a passing observation intended to contrast the ordinary raiyati lands and the private lands and the different classes of rights in them. Messrs. Mitter and Mukerji in their Commentaries on the Bengal Tenancy Act refer to the decision in *Ramji Ram* v. *Banshi Raut*[1] without dissent or disapproval but on the whole it must be conceded that the attempt of Justice Jwala Prasad could not be successful in the present state of authorities in the Indian High Courts.

SHAM DAS *v.* UMER DIN, I.L.R. 11 Lah. 312 (F.B.).

This Full Bench of the Lahore Court dissents from the Full Bench decision of the Madras Court in In re *Natha Venkatesa Perumal*[4] and prefers to follow the earlier decision in *Subba Naick* v. *Rama Aiyar*[5] which was overruled later. There is a good deal of force in the reasoning of Justice Tek Chand who points out that the language of S. 7 of the Guardians and Wards Act (VIII of 1890) is very general and there is no restriction that a conditional order cannot be passed in the first instance. We prefer the view of the Lahore Court. Section 34 of the Act is not exhaustive of the powers of the Court to ask for security in the matter of guardianship The later Full Bench decision of the Madras Court has taken a narrow view of the powers for which there is no sufficient justification in the Act itself. The practice was all along in accordance with the other view, and the Mofussil Rules of Practice also were drafted accordingly. The actual decision in the case could

2 (1922) L.R. 49 I A. 81 I.L R. 1 Pat 340. 43 M.L.J. 55 (P C.)
3 (1926) L R. 53 I.A 176 I.L.R 5 Pat 735 (P.C)
4 (1925) I.L.R. 49 M 809. 51 M.L.J. 726 (F.B.)
5 (1916) I.L.R. 40 M 775

have been rested on the grounds explained in the present judgment. The Calcutta High Court also is of the same opinion. *Harendra Nath Mukerjee* v. *Ardhendu Kumar Gangully.*[6]

NAGESHWAR BUX ROY *v.* BENGAL COAL COMPANY, 60 M.L.J. 183 (P.C.).

The decision of the Board in *Naghesswar Bux Roy* v. *Bengal Coal Company*[7] is couched in language which is somewhat ambiguous and obscure. Properly understood, the decision however does not really conflict with the law as laid down in earlier cases. There was no question of *onus* of proof as such that is decided in the case. On the whole evidence their Lordships find that the defendant company had, in the particular case, established dispossession of the plaintiff for the statutory period by establishing that they themselves have been for such period in possession and enjoyment to the exclusion of or adverse to the plaintiff.

The plaint itself was laid merely as a suit for declaration and injunction. The article of the Limitation Act that would apply is Art. 120. The question of Art. 142 or 144 turned up only as tending to establish the plea of the defendant company that they had acquired a title to the minerals under the statute of limitations. Their Lordships, however, point out that with reference to this aspect of the matter, the Lower Court treated the case as raising an issue of adverse possession under Art. 144 rather than of dispossession under Art. 142. They hold that the right view however is that the case fell to be decided under Art. 142. This must be so, because the plaintiff could not place himself in a better position than what he would be in, if he had filed the suit as for recovery of possession. In such a case, the *onus* is on him to establish that they were dispossessed or that he had discontinued within twelve years prior to suit, under Art. 142 as was well established by the prior decisions of the Judicial Committee. That is why their Lordships say that the residuary article could not apply. So understood the decision is not only in conformity with previous decisions but is really based on them. The decision in *Secretary of State for India* v. *Chellikani Rama Rao*[8] is distinguishable as there the *plaintiff* claimed compensation for his

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6 (1914) 24 I.C. 202
7. (1930) 60 M L.J. 183 (P C)
8 (1916) L.R. 43 I.A 192, I.L.R. 39 M. 617 31 M.L.J. 324 (P.C.).

rights which he claimed as having been established in him by the provisions of the Limitation Act. It may also be noted that their Lordships hold that adverse possession by the defendant may and in the present instance did imply dispossession of the plaintiff. Of course dispossession of the plaintiff may be established by other ways as well. The possession of a third party may also operate as dispossession of the plaintiff. At the same time, even if the defendant also is in possession of some sort, it may not amount to dispossession of the plaintiff. For an instance of this sort, see *Kuthali Moothavar* v. *Kunharankutty*[9]. Even in the present case, the plaintiff had an initial point in his favour as the dispute related only to the right to the minerals underground. The presumption of possession therefore should be with the person who owns them. That is why their Lordships state the question as whether the defendant company have established dispossession of the plaintiff for the twelve years preceding the suit. But the evidence of actual adverse possession by the defendant and consequent dispossession of the plaintiff was so complete that the question of *onus* really became immaterial.

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9. (1921) L.R. 48 I.A. 395: I.L.R. 44 M. 883: 41 M.L.J. 650 (P.C.).

MADAN MOHAN SINGH *v.* RAM SUNDAR SINGH, I.L.R. 52 All. 553.

The question in this case was as to when limitation starts under Art. 23 of the Limitation Act when the accused is discharged but subsequently there is an application for revision to the Sessions Judge which is dismissed—whether from the date of the order of discharge or from the order of the Sessions Judge dismissing the revision petition. Their Lordships hold that the limitation starts from the latter date and not from the former. They point out that in this matter acquittal stands on a different footing from cases of discharge, because while the acquittal is definite and fixed in connotation "termination of prosecution is an elastic term which can include not only original proceedings but also subsequent ineffectual proceedings." *Balbhaddar Singh* v. *Badri Sah*[1] cited in this case but for another purpose would itself seem to be an authority for this position. While holding that the plaintiff has not got to prove that he is innocent but only that the proceedings have terminated in his favour, their Lordships state further "in the present case it was sufficient for the appellants to prove as they have done that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath Teja Sundar ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial." This was a case of discharge by the Magistrate and the Sessions Judge issuing notice *suo motu* but finally declining to commit. Termination of the proceedings and termination of prosecution must mean the same thing. The difficulty of the Bombay High Court in *Purushottam Vithaldas* v. *Ravi Hari*[2] was, that the cause of action having arisen on the discharge, how it could be held to be suspended. There are two answers to the difficulty: just as the cause of action which has arisen might disappear by the final interference of the revisional authority, it might also disappear by the issue of notice by the Magistrate by destroying one of the essential conditions of the action, *viz.*, termination of the proceedings in favour of the plaintiff. Secondly, the starting of the cause of action need not necessarily be the starting point of limitation.

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1. (1926) I.L.R. 1 Luck. 215: 51 M.L.J. 42 (P.C.).
2. (1922) I.L.R. 47 B 28.

JADAB CHANDRA PODDAR *v.* RAMESHWAR MARWARI, I.L.R. 9 Pat. 332.

There is now a settled divergence of views amongst the High Courts as to whether the questions relating to "delivery and obstruction" under O. 21, R. 95, etc., Civil Procedure Code, relate to "execution, discharge or satisfaction" within the meaning of S. 47 and whether the questions arise between the parties where the auction-purchaser is the decree-holder himself. The Madras High Court has generally answered both the questions in the affirmative. The Calcutta High Court has in its latest Full Bench decision overruled some of the earlier cases to the contrary and has now taken the same view as the Madras High Court. *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1]. The Patna Court has however refused to change its old view (*Haji Abdul Gani* v. *Raja Ram*[2]) which it adopted from the Calcutta Court when it took the contrary view and is not prepared to have the question referred to a Full Bench. The Bombay High Court also in *Hargovind Fulchand* v. *Bhudar Raoji*[3] had answered the question in the negative, overruling its previous decision in *Sadashiv bin Mahadu* v. *Narayan Vithal*[4] which conformed to the Madras view. The Allahabad Court had already taken a similar view by a majority judgment in *Bhagwati* v. *Banwari Lal*[5]. In view of this conflict of opinion it is desirable that the matter should be cleared up by the Legislature. As regards the second question the language of the Privy Council judgment in *Ganapathi Mudaliar* v. *Krishnamachariar*[6] is in favour of the Madras and Calcutta view though it was not a considered pronouncement on the question. We think the reasoning of Chatterjee, J., in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1] is convincing as regards the first point. This conflict should be set at rest either by a decision of the Privy Council or by legislative interference.

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1 (1926) I.L.R. 53 C. 781 (F.B.).
2 (1916) 1 Pat. L.J. 232.
3. (1924) I.L.R. 48 B 550 (F.B.).
4. (1911) I.L.R. 35 B 452
5. (1908) I.L.R. 31 A. 82 (F.B.).
6 (1917) L.R. 45 I.A. 54: I.L.R. 41 M. 403: 34 M.L.J. 463 (P.C.).

RAMANATHAN CHETTY *v.* ALAGAPPA CHETTY, I.L.R. 53 Mad. 378; 59 M.L.J. 102.

The point in this case was whether applications to pass final decrees in suits for account of dissolved partnership are governed by Art. 181 of the Limitation Act. Mr. Justice Curgenven has come to the conclusion and we think rightly that there is no rule of limitation governing such applications as the Courts are bound to terminate such suits without application by the party. This was held in the Full Bench case in *Puran Chand* v. *Roy Radha Kishen*[1] in connection with an application to pass a final decree in respect of mesne profits and the same rule was applied in the case of a partition suit in *Dwarka Nath Misser* v. *Barinda Nath Misser*[2]. His Lordship points out the distinction between mortgage suits and partition suits in that in the former case the Statute requires an application by the party concerned whereas in partition suits no such application is required by the Civil Procedure Code. The law has been laid down in the same sense in partition suits by the Madras High Court also in *Appadu* v. *Venkataranga Rau*[3], *Appadu Patnaidu* v. *Appalaswami Patnaidu*[4] and *Srinivasa Mudali* v. *Ramaswami Mudali*[5]. In the last case the distinction between mortgage suits and other suits is also pointed out.

MUNICIPAL COUNCIL OF TIRUVARUR *v.* KANNUSWAMI PILLAI, I.L.R. 53 Mad. 352: 58 M.L.J. 377.

A contract of letting of tolls by a municipality did not comply with the statutory requirements as to writing and signature by two Municipal Councillors. The defendant went on with the collection of tolls till the end of the year and the question was what are the rights of parties in those circumstances. Their Lordships lay down the following propositions:—

(1) That the contract is void and unenforceable whether by the Municipal Council or by the defendant.

(2) The fact that the contract is fully carried out is immaterial.

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1 (1891) I.L.R. 19 C. 132 (F.B.)
2. (1895) I.L.R. 22 C. 425.
3 (1907) 18 M.L.J. 23
4 (1910) 8 M.L.T. 295.
5. (1915) 18 M.L.T. 145.

(3). But a decree may properly be given in favour of the Municipal Council on a principle analogous to *quantum meruit*.

In England, a distinction is made between cases where the requirement of writing is imposed by Statute and cases where it is a common law requirement. In the latter case, an action is sustainable when the consideration is fully executed. *Gas Light and Coke Co.* v. *Cannon Brewery Co.*[1] It is otherwise in the former case *Young & Co.* v. *Mayor, etc., of Royal Leamington Spa*[2]. Some of the cases in India (compare *Srirangam Municipal Council* v. *Bodi*[3] and *Municipal Committee, Gujranwalla* v. *Fazal Din*[4]) overlook this distinction.

The distinction is noted however in *Gas Light and Coke Co.* v. *Cannon Brewery Co.*[1] and further pointed out in *Douglass* v. *Rhyl Urban Council.*[5] In *Young & Co.* v. *Mayor, etc., of Royal Leamington Spa*[2] Lindley, L.J., points out that a decree on the basis of a liability *quasi ex contractu* for work done cannot be given against the Corporation as that would be defeating the object of the Legislature but the question before the House of Lords was merely whether the contract was enforceable on the footing of an executed contract. *Radha Krishna Das* v. *The Municipal Board of Benares*[6] negatived the claim against the municipality on the basis of section 65 of the Indian Contract Act holding that section inapplicable because that section applies only to cases "in which an agreement is void by reason of mistake or impossibility or in consequence of a want of legal consideration and also not to a case where the contract is *ab initio* void and not discovered to be void, and held also section 70 not applicable, because the plaintiffs could not be said to have lawfully delivered the goods and section 72, because there could be no question of mistake in a case like this. A different view has, however, since been taken. In *Mathura Mohan Saha* v. *Ram Kumar Saha*[7] Mr. Justice Mukherjee directed the Municipal Council to return the money received. The principle of the decision is that if the agreement is *ultra vires* or illegal the Corporation has no authority to hold the money and is bound to return it. "The obligation," says his Lordship, "to do justice rests upon all persons, natural and artificial; if one obtains

1 (1903) 1 K.B. 593 at 601.
2 (1883) 8 A.C. 517.
3. (1923) 45 M.L.J. 164
4 A.I.R. 1929 Lah 742
5. (1913) 2 Ch. 407.
6 (1905) I.L.R. 27 A 592.
7. (1915) I.L.R. 43 C 790.

money or property of others without authority, the law independently of express contract will compel restitution or compensation". It is doubtful how far this principle will assist when the claim is against the municipality for work done for in such case there is no property to return. The principle of *quantum meruit* is applied in *Mohamed Ebrahim Molla* v. *Commissioners for the Port of Chittagong*[8] and a private party entering into such an agreement with the Corporation was directed to pay for services done. In *Municipal Committee, Gujranwalla* v. *Fasal Din*[4] the Lahore High Court directed the private party to return the benefit he had derived under the contract, relying upon *Lawford* v. *Billericay Rural District Council*[9]. The judgment is unsatisfactory inasmuch as it does not notice the distinction between statutory requirement of writing and common law requirement as to the same. A later Lahore case *Prem Das* v. *Charan Das*[10] discusses the matter on principle. The statute in question there was the Government of India Act, section 30 (2). The Government had the benefit of the grain supplied by the private contractor and their Lordships held that section 70, Contract Act, would apply to such a case; whether under the English Law, the Court could make the order or not, under the Indian Law as laid down in S. 70 the Court could. Their Lordships refer to the observations of Justice Mukherjee in *Mathura Mohan Saha* v. *Ram Kumar Saha*[7] above referred to and justify the direction as to the return of the grain or its value on that footing also. In *Thangammal Ayiyar* v. *Krishnan*[11] (it was not a case of Corporation but of an agreement void under section 28 of the Legal Practitioners Act) their Lordships directed the client to pay a fair price for the services rendered by the practitioner under section 65 of the Contract Act. The only difficulty in so holding was that presented by the words "discovered to be void or has become void" in that section. This difficulty has been removed by the Privy Council by its decisions in *Harnath Kunwar* v. *Indar Bahadur Singh*[12] and *Annada Mohan Roy* v. *Gour Mohan Mullick*[13] where their Lordships apply the section to a case of *ab initio* void agreements and consider that the section is satisfied by holding that the agreement is discovered to be void at the very inception.

4. A.I.R. 1929 Lah. 742. 7 (1915) I.L.R. 43 C. 790 at 827.
8 (1926) I.L.R. 54 C. 189. 9. (1903) 1 K.B. 772
10 A.I.R. 1930 Lah 362 at 364.
11. (1929) I.L R. 53 M 309: 57 M.L J. 756
12 (1922) L.R. 50 I.A. 69: I L.R. 45 A. 179: 44 M.L.J. 489 (P C.).
13. (1923) L.R. 50 I.A. 239. I.L.R 50 C 929: 45 M.L.J. 617 (P.C.).

This seems to be a satisfactory solution of the question. It would apply equally to artificial with natural persons with this distinction that if the benefit is one which is *ultra vires* of the Corporation to receive and there is no means of tracing it to the assets of the Corporation even in the extended sense in which that doctrine is taken in *Sinclair* v. *Brougham*[14] the Court may be powerless to direct the restoration for, in that case, there is no benefit taken by the Corporation because none can be taken having regard to its statutory powers. If the materials supplied are found with the Corporation or the money has got into its coffers, the Court may direct return of such materials or such money but it cannot direct compensation for labour done which can only be done by imposing upon the Corporation a benefit which it is not competent for it to take. There is no such difficulty in the case of private parties. Private parties are under no such disability and Courts can always direct them to restore the benefit. Section 65 would not apply to cases where there never could be a contract between the parties (*Mohori Bibee* v. *Dharmodas Ghose*[15]), that is to say, it excludes cases of infants and of Corporations in respect of matters which are *ultra vires*. If the subject-matter is *intra vires*, then there is no difficulty in applying the section.

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14 (1914) A.C. 398

15 (1902) L.R. 30 I.A. 114. I.L.R. 30 C 539 at 548 (P.C.)

BAL KRISHNA SHARMA *v.* PAIJ SINGH, I.L.R. 52 All. 705.

The question in this case was whether lands assigned for the maintenance of a Hindu widow are transferable. Their Lordships hold, we think, rightly that they are. They distinguish cases on attachment which is governed by section 60, Civil Procedure Code, cl. (*n*). Their Lordships are of opinion however that if the grant is without right of alienation it might stand on a different footing for then the case might come within section 6, cl. (*d*). The case fell to be decided under the unamended Transfer of Property Act. Under section 6 of the Act as amended "a right to future maintenance, in whatsoever manner arising secured or determined," cannot be transferred. The law seems thus to be approximated to S. 60, cl. (*n*) under which a grant for maintenance to a widow is not attachable: see *Rajendra Narain Singh* v. *Sundara Bibi.*[1]

A further question arose in the case as to whether the lands so assigned were forfeited on re-marriage where re-marriage is permitted under the caste rules. The view of the Madras High Court as expressed in *Murugayi* v. *Viramakali*[2] and reaffirmed in *Vitta Tayaramma* v. *Chatakondu Sivayya*[3] is that she will forfeit. The same is the view of the Bombay and the Calcutta High Courts: see *Tikum Singh* v. *Sheo Ram Singh*[4] and *Vithu* v. *Govinda.*[5] The Allahabad High Court has been taking a different view though the correctness of that view was doubted in *Mula* v. *Partab.*[6]

Right to recover mesne profits apart from any interest in land has been held not to be assignable in a series of cases, *Seetamma* v. *Venkataramanayya,*[7] *Jai Narayan Pande* v. *Kishun Dutta Misra*[8] and *Durga Chandra Roy* v. *Koilash Chander Roy,*[9] though Mr. Justice Sadasiva Aiyar in *Venkatarama Aiyar* v. *Ramasami Aiyar*[10] and Mr. Justice Mukerjee in *Emperor* v. *Angad*[11] would seem to question the correctness of those decisions. Whether the same rule should apply to mesne profits accruing before the sale or transfer of the land when there is a transfer of

1. (1925) L.R. 52 I.A. 262: I.L.R. 47 A. 385: 49 M.L.J 244 (P.C.)
2. (1877) I.L.R. 1 M. 226.
3. (1918) I.L.R. 41 M 1078: 35 M.L.J. 317 (F.B.).
4. (1891) I.L.R. 19 C. 289 (F.B.)
5. (1896) I.L.R. 22 B. 321 (F B.)
6. (1910) I.L.R. 32 A 489.
7. (1913) I.L.R. 38 M. 308. 25 M.L.J. 410
8. (1924) I L.R. 3 Pat 575
9. (1897) 2 C.W.N. 43.
10. (1920) I.L.R. 44 M 539. 40 M.L.J. 204.
11. A.I.R. 1929 A. 69.

the land also there seems to be a difference of opinion: *Seetamma* v. *Venkataramanayya,*[7] *Chandrasekaralingam* v. *Nagabhushanam,*[11] *Muthu Hengsu* v. *Netravathi Naiksavi*[13] taking one view, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar *obiter* in *Venkatarama Aiyar* v. *Ramasami Aiyar,*[10] *Monmatha Nath Dutt* v. *Mati Lal Mitra,*[14] *Emperor* v. *Angad*[11] taking the other view. The English rule as laid down in *Chapman* v. *Leach*[15] would seem to be in accordance with the latter view. But as pointed out by Mr. Justice Ramesam in *Chandrasekaralingam* v. *Nagabhushanam* [11] there is considerable difference between the English law and the Indian in this matter. The English rule would not seem to prohibit the assignment of the damages that might be obtained in an action for slander. See *Glegg* v. *Bromley*[16] referred to in *Subhadrayamma* v. *Venkatapati Raju* [17] if the objection on the ground of champerty or maintenance is got rid of. Assignment of *spes successionis* is not prohibited by English Law. The common law prohibitions are easily got rid of by the rule of Equity as to assignment of non-existent property. This course is not open according to the Privy Council in this country. *Ananda Mohan Roy* v. *Gour Mohan Mullick.*[18] Having regard to section 8 of the Transfer of Property Act, as an incident of a transfer of property only future rents and profits pass. Judges who take the other view would seem to read into the words in the absence of a contract to the contrary, the right to include past mesne profits as incidental or subsidiary to the transfer. The reasoning is not satisfactory. Right to past rent of course stands on a different footing from the claim for mesne profits. The right to rent already accrued is a debt and is assignable as an actionable claim. A right to mesne profits is substantially a claim for damages.

BALDEO PRASAD *v.* ARYA PRITI NIDHI, I.L.R. 52 All. 789.

No doubt where the rules of the religious society to which a Hindu belongs insist Viraja Homam, etc., as essential for attain-

7 (1913) I.L.R. 38 M 308 · 25 M.L.J. 410
10. (1920) I.L.R. 44 M 539 40 M.L.J. 204
11 A.I.R. 1929 A. 69.
12 (1927) 53 M.L.J. 342
13 (1920) 12 L.W. 44.
14 (1928) 33 C.W.N. 614.
15 (1920) 1 K.B. 339.
16. (1912) 3 K.B. 474.
17. (1924) L.R. 52 I.A. 1: I.L R. 48 M 230: 47 M.L.J. 93 (P.C.)
18. (1923) L.R. 50 I.A. 239: I.L.R. 50 C 929: 45 M.L.J. 617 (P.C.)

ing the status of sanyasi, it is right to hold that so long as those ceremonies are not performed, he would not attain that status. We do not quite see why if the sect to which the party belongs does not require such ceremonies or contemplates other ceremonies, in such a case compliance with the conditions laid down by such society should not suffice for the purpose. In a Madras case, *Sambasiva Pillai* v. *Secretary of State*[1] a Sudra ascetic is recognised though the Hindu Law proper does not recognise one such. The Hindu Law is very tolerant of heretical sects and would permit them the observance of their own rules.

MA NYEIN YONE *v.* P. D. PATEL, *Receiver to the Estate of Hajee Yacob Ali*, I.L.R. 8 Rang. 423.

The question for decision in this case was whether a person who was allowed to appeal as a pauper but whose appeal was dismissed, could file an application for review of the appellate judgment also in *forma pauperis*. The learned Judges hold that a review is something different from suits and appeals, that the Code while it has expressly provided for leave to litigate in *forma pauperis* in the case of suits (O. 33) and appeals (O. 44) has made no provision for cases of revision and review and as such the Court has no power to grant leave to apply in *forma pauperis* in those cases. S. 151, Civil Procedure Code, has been invoked often to fill up lacuna in the Code whenever justice of the case demanded it, provided it did not conflict with any specific provision in the Code but it is very doubtful if the Court can invoke the aid of S. 151, Civil Procedure Code, when it affects the Court Fees Act (see In re *Maharaja of Venkatagiri*[1-a] and In re *Vaithilinga Pandara Sannadhi*[2] or when it is a case where the question has been before the legislature and it has designedly or not restricted it to certain cases. See, e.g., *Neelaveni* v. *Narayana Reddi*,[3] where the Madras High Court held that inherent power cannot be invoked to set aside an *ex parte* decree. A contrary view is taken in Allahabad and Bombay. *Lalta Prasad* v. *Ram Karan*,[4] *Bilasrai Lakshminarayan* v *Cursondas Damodardas*[5] and *Maung Saw* v. *Ma Bwin Byu*[6]. In *Jagadanand Asram* v. *Rajendra Roy*,[7] *Ramkishen Lal*

1 (1921) I.L.R. 44 M 704 41 M.L J. 109
1-a. (1929) 58 M L.J. 510. 2 (1929) 58 M.L.J. 521
3 (1919) I L.R. 43 M 94. 37 M L.J. 599 (F B.)
4 (1912) I.L R. 34 A 426 5 (1919) I.L.R. 44 B 82
6 (1925) I.L R. 4 Rang. 18 7. (1912) 17 C.L J. 381.

v. *Manna Kumri*[8] and *Amba* v. *Srinivasa Kamathi*[9] it was held that the High Court has no power to grant leave to appeal to the Privy Council in *forma pauperis.* The case under review begins by stating that there is no case in which permission was granted to apply for review in *forma pauperis.* But in *Umda Bibi* v. *Naima Bibi*[10] permission was granted to file a review application in *forma pauperis* to review a judgment in a suit and that is cited in Sir Mulla's Civil Procedure Code without comment. The reasoning therein, if correct, will equally apply to the case of a review of an appellate judgment. It may not be permissible to speculate as to the possible intention of the legislature from the injustice and hardship that may result from holding one view or the other, but the main ground of the judgment in *Umda Bibi* v *Naima Bibi*[10] is that it is "one of the incidents of a suit that a party aggrieved by a decree or order in that suit may under certain circumstances present an application for review" and that therefore it is "a proceeding connected with the suit within the meaning of S 410" (now O. 33, R. 8). This is only another way of stating that review is in a sense a continuation of the suit (or appeal). That reasoning may not apply to the case of "revision," as in that case even the forum changes.

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8. (1917) 3 Pat L J 179 9 (1918) I L.R. 42 M 32: 35 M.L J. 258.
10 (1898) I.L.R. 20 A. 410

JAHANDAD KHAN *v.* ABDUL GHAFUR KHAN, L.R. 57 I.A. 273: I.L.R. 11 Lah. 638: 59 M.L.J. 399 (P.C.).

It is well established that a plaintiff who relies on a title by adverse possession must clearly establish that his possession is adequate in quantity, in publicity and in extent to show that it is possession adverse to the competitor. In the case of uncultivated jungle land there is special difficulty in establishing this. In the decision under notice, the Privy Council reversed the finding of the Judicial Commissioner and restored that of the first Court. The title was clearly found to be with the defendant, as a result of a prior litigation between the parties which was *res judicata*. The error into which the Judicial Commissioner fell was in ignoring the presumption that possession follows title where it is undetermined or ambiguous. Merely because the evidence for the plaintiff was more worthy of credit than that for the defendant, where both sides had given evidence, he thought that he should find for the plaintiff. This of course was an error as the plaintiff had to establish affirmatively his exclusive possession for the statutory period as a fact. As pointed out by the Privy Council in *Rajkumar* v. *Gobind Chunder*,[1] where evidence of possession by the plaintiff is opposed by *equally strong* evidence on the part of the defendant, it is legitimate to the Court to apply the presumption that possession follows title. The Indian Courts have no doubt held that the presumption cannot be acted upon where the evidence of possession on both sides is equally unworthy of credence. *Shiva Prasad* v. *Hira Singh*[2] and *Rakhal Chandra* v. *Durga Das*.[3] If evidence of possession is not unworthy of credence but is merely weak or unsatisfactory (but credible) the presumption should in a proper case be allowed to prevail. See *Matuk Singh* v. *Tian Sahu*.[4] The onus of proof that lay on the plaintiff in the case could not therefore be held to have been discharged merely because the evidence for the plaintiff was more worthy of credit than that for the defendant. Exclusive possession of the required character must be found as a fact on the whole of the evidence before the plaintiff can establish a title by adverse possession.

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1. (1892) L.R. 19 I.A. 140: I.L.R. 19 C. 660 (P.C.).
2. (1921) 62 I.C. 1 (F.B.)
3. (1922) 26 C.W.N. 724.
4. (1922) I.L.R. 2 Pat 1.

SHALIG RAM *v.* CHARANJIT LAL, L.R. 57 I.A. 282: I.L.R. 11 Lah. 645: 59 M.L.J. 437 (P.C.).

This decision must be taken to be an authority for the view that the expression *waris* translated as "heirs" is a term of sufficient amplitude to confer full rights of ownership without any further explicit language conferring powers of free alienation, etc., even though it is used in connection with Hindu females as objects of the gift. It is not, however, clear whether their Lordships would hold that the fact that the donee is a Hindu widow would not by itself amount to a circumstance to indicate in the context that the intention of the donor was only to limit her interest to a limited estate. In the particular case the donees were not merely the Hindu widows but also a daughter-in-law and all three were given properties jointly as heirs. Whether their Lordships would have come to the same conclusion if the daughter-in-law also were not a joint donee, is by no means clear. One does wish that the judgment of the highest tribunal should be fuller in the portion which deals with the *ratio decidendi*, having regard to the importance and consequences of their Lordships' pronouncements.

MT. BOLO *v.* MT. KOKLAN, L.R. 57 I.A. 325: I.L.R. 11 Lah. 657: 59 M.L.J. 621 (P.C.).

The main point in this case was one of limitation. Their Lordships hold that Art. 120 of the Limitation Act did not stand in the way of the respondent's claim. The judgment holds that there can be "no right to sue" within the meaning of the third column of Art. 120 until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. Applying this test, it was held on the findings of fact accepted by their Lordships that the right to sue accrued to Mt. Koklan only within six years of the suit as there was no *clear* denial of her right till 1922, the year of the previous suit. It may be noted that in *Jitendra Nath Ghose* v. *Manmohan Ghose*[1] the same view had been taken although the proposition is not stated in so many words. Their Lordships held in that case that the plaintiffs who brought a substantive civil suit for a declaration that certain rent decrees obtained by the defendant landlord against certain third parties under the Bengal Tenancy Act and which he wanted to

1. (1930) L.R. 57 I.A. 214: I.L.R. 58 C. 301: 59 M.L.J. 607 (P.C).

execute against the tenure which had come to be vested in the plaintiffs by valid transfers from the original tenants, were not binding on them and for an injunction restraining the defendant from bringing the tenure to sale, were in time under Art. 120, as they filed the suit within six years from the date when the defendant first applied for sale of the tenure, though more than six years had elapsed from the dates of the respective invalid decrees. It has even been held by the Privy Council that there can be no right to sue accruing to a plaintiff who has no right of action at all in respect of a subject-matter unless and until a prior condition is satisfied such as the grant of a certificate under the Pensions Act in respect of a right to obtain a malikana, and limitation will start to run only when such a condition is satisfied as, for instance, in the illustration by obtaining the certificate. See *Mt. Jaggo Bai* v. *Utsava Lal.*[2] It would thus seem that the expression "when the right to sue accrues" is even wider than the expression "when the cause of action accrues". For more recent applications of the test laid down in the judgment, see *Annamalai Chettiar* v. *Muthukaruppan Chettiar*[3] and *Raj Kumar Gobinda Narayan Singh* v. *Sham Lal Singh.*[4]

HAKIM SYED MAHOMED TAKI *v.* RAI FATEH BAHADUR SINGH, I.L.R. 9 Pat. 372 (F.B.).

It is somewhat curious that there should be so little authority on the point involved in this Full Bench decision though it is one which must arise very frequently. The question is whether O. 22, R. 3 and R. 4 apply to appeals under S. 47 against orders in execution of decrees The majority hold that they do not apply by virtue of the operation of O. 22, R. 12, while Das, J., who dissents, holds that they do and that O. 22, R. 12 is confined only to proceedings in the Court which passed the decree or in the Court to which it is sent for execution and that it does not cover proceedings in the appellate Court. We are inclined to agree with the views of Das, J. The scheme of the Code points to a clear distinction between suits, appeals and execution proceedings. The language of O. 22, R. 12 may be wide enough to include even appellate proceedings in execution, which also are in a sense execution proceedings, as they originate from them. But notwithstanding this, the intention of

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2 (1929) L.R. 56 I A. 267· I.L.R. 51 A. 439: 57 M L.J. 160 (P C)
3 (1930) I.L.R. 8 R 645· 60 M.L.J. 1 (P.C.).
4. (1931) 35 C.W.N. 521 (P C).

the legislature seems to be that all appeals should be governed by O. 22, Rr. 3 and 4. The consequence of the view that abatement rules do not apply to execution proceedings is to give three years time for the legal representatives to come on record under Art. 181, as the shorter period of three months is inapplicable. The view of the Madras Court in *Palaniappa Chettiar* v. *Valliammai Achi*[1] that no legal representative can continue the execution application is practically overruled by later decisions. See *Venkata Lakshmamma* v. *Seshagiri Rao*.[2] It could hardly have been the intention of the legislature that a distinction should be made between appeals from a decree and appeals against execution orders, in the matter of the period of time within which a legal representative of a deceased appellant or respondent should come on record. On the whole we think, while the majority view cannot be said to be an impossible one on the language of the Code, the more sound view is that of the dissenting Judge.

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1 (1926) I.L.R. 50 M. 1· 51 M.L.J. 745
2. (1931) M.W.N. 48

NATHA NATHURAM *v.* MEHTA CHOTALAL, I.L.R. 55 Bom. 1.

This decision is one of considerable interest by reason of the discussion of several important questions relating the law of marriage and inheritance in Hindu Law. The first question was about the validity of the marriage between persons belonging to different castes among the Hindus. So far as regards marriages between members of different sub-castes of the same main caste are concerned, it has been held, by all the High Courts and by the Privy Council, that such marriages are valid under the Hindu Law. See *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*,[1] *Ramamani Ammal* v. *Kulanthai Natchear*,[2] *Upoma Kuchain* v. *Bholaram Dhubi*,[3] *Biswanath Das Ghose* v. *Shorashibala Dasi*,[4] *Fakirgauda* v. *Gangi*,[5] *Mahantawa* v. *Gangawa*,[6] *Har Prasad* v. *Kewal*[7] and *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik*.[8] Though these cases related to inter-marriages between various sub-castes of the Sudra caste, no different considerations would seem to arise in cases of marriages between members of different sub-castes of other castes. When we come to cases of marriages between members of different castes, we find great diversity of opinion among writers and Judges. As pointed out by Mr. Justice Shah in *Bai Gulab* v. *Jiwanlal Harilal*[9] and Mr. Justice Patkar in the case under notice the Smriti writers certainly recognised as legal, marriages between males of a higher caste and females of a lower caste, though marriages in the reverse order were not considered legal. But learned writers like the late Sir Gurudas Bannerjee and Mr. Mayne have expressed their view in general terms that inter-caste marriages may not be legal at the present time and decisions are not wanting in support of their view. See *Padam Kumari* v. *Suraj Kumari*,[10] *Melaram Nudial* v. *Thanooram Banuun*[11] where even *anuloma* marriages were held to be not valid under the Hindu Law apart from custom. *Pratiloma* marriages, however, have always been held to be illegal. *Bai Kashi* v. *Jamnadas*.[12] The whole matter came

1. (1869) 13 Moo.I.A. 141.
2. (1871) 14 Moo.I A 346.
3. (1888) I.L.R. 15 C. 708.
4. (1921) I.L.R. 48 C. 926.
5. (1896) I.L.R. 22 B. 277.
6. (1909) I.L.R. 33 B. 693.
7. (1924) I.L.R. 47 A. 169
8. (1894) I.L.R. 17 M 422.
9. (1921) I.L.R. 46 B 871
10. (1906) I.L.R. 28 A. 458
11. (1868) 9 W.R. 552
12. (1912) 14 Bom L.R. 547.

under review in *Bai Gulab* v. *Jiwanlal Harilal*[9] and the learned Judges held in that case that the view of the Smriti writers in favour of the validity of *anuloma* marriages held good at the present day, though we do not find in the judgment any reference to the cases mentioned above. The learned Judges in the case under notice have followed the decision in *Bai Gulab* v. *Jiwanlal Harilal*[9] and upheld the validity of the marriage of a Brahmin with a Sudra woman. What is perhaps more interesting is that a single Judge of the Madras High Court has in a recent case not only held that *anuloma* marriages are valid at the present day under the Hindu Law following *Bai Gulab* v. *Jiwanlal Harilal*,[9] but gone further and observed, though *obiter*, that he should not be understood as saying that *pratiloma* marriages are invalid. See *Ratansi D. Morarji* v. *The Administrator-General of Madras*.[13] It may be mentioned in this connection that there are no considerations peculiar to the Bombay school of Hindu Law in favour of inter-caste marriages which would be inapplicable to the other parts of India, because the authorities relied on are Manu and Yagnavalkya and the commentaries of Vignaneswara and no special rule of Nilakantha in the Mayukha, solely applicable to Bombay.

The second question that has been considered in the case is the right of succession of the son born to a Brahmin by his Sudra wife in respect of his father's estate. The matter is so fully dealt with in the inheritance portion of Mitakshara, Chapter I, section 8, that there is no need to go elsewhere for it. It has been laid down there that such a son would take only one-tenth of his father's estate; and the learned Judges in the present case have adopted it. There is, however, one restriction in that section to the effect that such a son would not take a share in his father's immoveables. It is not clear whether the learned Judges would adopt that restriction also.

The third question and the one that arose directly in the case was the right of such a son to collateral succession. In the present case, the succession was to the properties of his father's brother. The learned Judges have followed the analogy of the succession to his father's properties and held that he would take only a tenth share of the inheritance of his uncle and the other nine-tenths would go to the other though remoter sapindas of the deceased. As one of the learned Judges has observed, this matter is by no means free from difficulty.

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9 (1921) I.L.R. 46 B 871

13 (1928) 55 M.L.J. 478.

The Mitakshara has only laid down that a son by a Sudra wife will take a tenth share of his father's effects. The chapter has only to do with the succession to a father's estate and deals mainly with the competition between the sons of wives of different castes. If once it is conceded that he is the legitimate son of his father, it is difficult to see why his rights should be so cut down when he inherits to collaterals, in the absence of anything in the texts to that effect. Instances are not wanting of classes of sons who take a restricted share of their father's estate in competition with a superior class of sons but take the whole inheritance in the case of collaterals. Reference may be made in this connection to the case of adopted sons who take a smaller share along with *aurasa* sons but take the whole inheritance of collaterals. See *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*.[1] The case of an illegitimate son who does not inherit to collaterals is hardly a parallel for the very reason that he is not legitimate and not a son in the strict sense of the term *aurasa* and comes in at all as an heir only by reason of special texts.

JALBHAI CURSETJI *v.* JERBAI HORMUSJI, I.L.R. 55 Bom. 145.

In this case an application was made before a single Judge of the Bombay High Court for orders as to who was to celebrate the thread marriage of a Parsi minor girl who was a ward of Court. Against the order passed by the learned Judge, an appeal was taken to a bench of two Judges who reversed the order of the single Judge. While there may be nothing wrong on the merits of the order passed on appeal, it is somewhat difficult to follow the learned Judges when they observe that though there may be no right of appeal under the Guardian and Wards Act or clause 15 of the Letters Patent, there is a right of appeal under the inherent jurisdiction in a matter of that sort. We believe it has always been well understood that an appeal does not exist in the nature of things and that a right of appeal from any decision of any tribunal must be given by express enactment. *See per* Bramwell, L.J., in *Sandback Charity Trustees* v. *North Staffordshire Railway Co.*[2] approved by the Privy Council in *Rangoon Botatoung Company, Ltd.* v. *The Collector, Rangoon.*[3] Reference may also be made to the same effect to the decision of the Privy Council in *Minakshi* v. *Subramanya.*[4]

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1 (1915) L.R 43 I.A. 56 I L.R. 40 B 270. 30 M L.J. 193 (P C)
2. (1877) 3 Q.B.D. 1
3. (1912) L R. 39 I.A. 197· I L.R. 40 C. 21 at 27 23 M L.J. 276 (P.C.)
4. (1887) L.R. 14 I.A. 160: I.L.R. 11 M 26 (P.C).

MAHANT SHANTANAND GIR *v.* MAHANT BASUDEVANAND GIR, I.L.R. 52 All. 619 (F.B.).

This case covers a wide range of points. The initial question of fact was as to whether the advocate was guilty of contempt of Court or abuse of process of the Court in applying to attach the security furnished by the judgment-debtor for costs of the respondent in the Privy Council. The motive of the party apparently was to burke the appeal to the Privy Council and that motive appeared to be known and shared in by the advocate judging from his arguments before the Court of First Instance and the admissions before the appellate Court. All this seems to us to be beside the point; there is no reason as the majority hold why the party should not attach the security amount. The attachment will not lead to the immediate payment of the money to the decree-holder but would entitle him to the ultimate balance that might remain after satisfying the claims of the respondent. We should also think that the presentation of such a petition could not amount to any professional misconduct on the part of the advocate concerned. It would be adding a new terror to the advocate's life in this country if he should be held responsible not for any false statement or dishonest suppression of facts or his being a party to the putting forward of a false or vexatious claim but for the possibility of the Court by reason of its ignorance of law making a wrong order in the absence of a warning by him. We think, where a party is entitled to the relief claimed and there is no suppression of fact, the motives, desires and possibilities should be altogether excluded from consideration.

The further questions were whether the High Court could having regard to the reprehensible conduct of the practitioner in urging that the security money should be entirely paid over to the decree-holder with a view to burke the appeal to the Privy Council, order the advocate concerned to pay the respondent the loss sustained by him by the unreasonable or improper conduct of the advocate. On this point three Judges hold that the High Court has power while the others hold that even if the High Court had the power before, that power is taken away by the Bar Councils Act and the only course open to the Court now is to refer the matter to the Bar Council and to impose such penalties as that Act contemplates if the advocate is found guilty. They hold that the Court has no power to award as costs an amount higher than the expenses actually incurred and awardable under the rules merely as a punishment or penalty. *Willmoth* v.

Barber.[1] They also hold that though the powers of the Court to order payment of costs under S. 35 may not be limited to parties, it does not extend to advocates. That would seem to follow from the fact that admittedly the Subordinate Courts do not possess such power. In a case in India where the order was made (*Muruga Chetty* v. *Rajasami*[2]) it was expressed to be done in the exercise of the disciplinary jurisdiction of the Court and such disciplinary jurisdiction is now regulated by the Bar Councils Act. Viewing the conduct of the advocate as constituting a contempt, they hold that the contempt of Courts Act should govern the matter and steps should be taken under that Act. They hold further having regard to cl. 14 of the Letters Patent corresponding to cl. 21 of the Madras Letters Patent, the High Court could not make an order as to costs which the Lower Court could not do under the law applicable to such Court. If the Lower Court could not make the order, the High Court could not do it either. As regards the costs before it, assuming it had wider power, there was no impropriety in the conduct of the appeal as only proper grounds were taken in the appeal. They further hold that the wide powers held by the Supreme Court of Calcutta and inherited by the Calcutta High Court are not inherited by the Allahabad High Court and its powers are only such as are expressly conferred on it or are incident to its position as a Supreme Court of Appeal or as a Court of Record. On the whole, we think, it is advisable that these vague and undefined powers are defined and made easily ascertainable so that they may not be arbitrarily or capriciously exercised. In England there are two classes of practitioners, the solicitors and advocates, to whom different rules apply. If the solicitor acted on counsel's advice he is protected. It is difficult to say to what extent in a particular transaction the advocate in this country is discharging the solicitor's function and to what extent, the advocate's. Again, the Court exercises much larger powers both against the solicitor and in his favour. It declares a charge over the proceeds of the litigation in his favour, it canvasses agreements in his favour and passes orders in respect of them. The Court in the mofussil has no such power nor does the High Court seem to have such power in the case of advocates.

One of the questions that incidentally arose in this case was as to whether the Statement of Objects and Reasons could be looked into in aid of the interpretation of a statute. Here also

1 (1881) 17 Ch.D. 772. 2 (1912) 22 M.L.J. 284.

the majority hold that it cannot be while the minority hold the contrary. The judgment is given without advertence to the judgment of the Privy Council in *Krishna Aiyangar* v. *Nallaperumal Pillai*,[1] where their Lordships expressly say "no statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of words" which would seem to conclude the matter.

MOTILAL *v*. UNAO COMMERCIAL BANK, LTD., I.L.R. 52 All. 851: 59 M.L.J. 661 (P.C.).

In this case the munib of a mercantile firm accepted some hundies and drew others in pursuance of a conspiracy between himself and a partner of the firm to defraud the firm and the question was whether such transactions bound the firm. The discounting banks had no notice of the conspiracy. It was alleged that the authority in fact given by the partner to the munib had been cancelled by the other partner but such cancellation was not proved. It was held by their Lordships that in the circumstances the transactions bound the firm—the implied authority of a partner in a mercantile firm to draw and accept bills on behalf of the firm being well recognised. (*Bunarsee Dass* v. *Gholam Hossein*[2]). The termination of the agent's authority does not under S. 208 of the Contract Act take effect as regards third persons before it becomes known to them and neither the agent's fraud (*see* S. 238, *Lloyd* v. *Grace*[3]) nor the fraud of the partner whose position is the same as that of the agent in this matter (S. 251, Ill. (*d*) particularly) is an exonerating factor in the absence of knowledge brought home to the party dealing with them.

[END OF VOL. LX.]

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1 (1919) L.R. 47 I.A. 33: I.L.R. 43 M. 550 at 565: 38 M.L.J. 444 (P.C.).
2. (1870) 13 M.I.A. 358.
3. (1912) A.C. 716.

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NOTES OF RECENT CASES.

Jackson, J. Cr. A. No. 391 of 1930.
27th November, 1930.

Indian Penal Code, S. 387—Offence triable by assessors—Tried by Jury—Effect on the right of appeal.

If an offence triable by assessors is erroneously tried by Jury, the accused has a right of appeal on facts, treating the charge to the Jury as the judgment, and the verdict of the Jury as the opinion of the assessors.

26 Mad. 243 (*n.*): 6 M.L.J. 14 followed.

25 Bom. 680 distinguished.

V. L. Ethiraj and *M. Sriramamurti* for Appellant.

The Public Prosecutor for the Crown.

S.V.V.

Jackson, J. C.R.P. No. 691 of 1929.
28th November, 1930.

Civil Procedure Code (V of 1908), Order 2, rule 2—Subscription to chit fund payable in instalments—Whole amount recoverable on default—Suit filed after default to recover part of amount due—Subsequent suit for balance—Bar.

The plaintiff claimed as the assignee of a Karaswan's right in a chit fund, the subscriptions payable in a number of instalments by the defendant. By a document executed by the defendant in favour of the Karaswan, he made himself liable to pay all the future instalments at once in case he made default in the payment of any one instalment. The defendant having committed default the plaintiff sued him to recover a portion of the amount that had become payable and obtained a decree. Subsequently he brought another suit for the balance still due.

Held, that the later suit was barred by O. 2, R. 2, Civil Procedure Code.

(1929) M.W.N. 204 followed.

A. Swaminatha Aiyar for Petitioner.

K. Balasubramania Aiyar for Respondent.

B.V.V.

Madhavan Nair, J. S.A. No. 1583 of 1927.
1st December, 1930.

Fraud—Suit to set aside decree for fraud—Wilful suppression of fact which it was the duty of plaintiff to disclose—Defendant remaining ex parte—*Court, if can set aside the decree.*

Where a party obtains a decree in a suit in which the defendant is *ex parte* by deliberately putting forward a false case before the Court and by misleading it by suppressing a fact which it was his duty to disclose to the Court, such a decree can be set aside in a subsequent suit on the ground of fraud practised upon the Court by putting forward a case false to the knowledge of the plaintiff.

18 C.W.N. 447; 63 I.C. 712; 23 I.C. 976 followed.

Cases like 38 Mad. 203, 41 Mad. 743 where material evidence was suppressed or perjured evidence given distinguished.

Case-law discussed.

The unquestioned jurisdiction of a Court to set aside a decree on the ground of fraud is to be exercised with care and reserve.

41 Cal. 990 referred to.

P. Venkatramana Rao for Appellant.

P. Somasundaram for Respondents.

S.V.V.

Madhavan Nair, J. S.A. No. 1722 of 1927.
19th January, 1931.

Joint family—Father doing speculative business—Trade not inherited—Mortgage of family properties—Whether binding on minor sons.

A mortgage transaction entered into by a father cannot affect the interests of the minor sons in the joint family property, having regard to the finding, that the transaction was purely of a speculative character and did not in any way benefit the family.

52 M. 227 distinguished.

51 M. 711 relied on.

41 M. 824 referred to.

T. L. Venkatarama Aiyar for Appellant.

B. Sitarama Rao and *T. Nallasivam Pillai* for Respondent.

K.C.

Wallace and Krishnan Pandalai, JJ. A.S. No. 347 of 1929.
8th December, 1930.

Hindu Law—Widow—Continuance of her husband's trade—Mortgage to meet business debts—No pressure from creditors—Validity of mortgage—Portion of trade assets utilised in completing a godown begun by the husband—Proper decree to be passed.

A Hindu widow continued a grocery business which her husband had been doing and she associated as a partner with herself her son-in-law who had been attending to the business as a clerk during the husband's lifetime.

Held, that as the business was the main source of income to the family, it was within the power of the widow under the Hindu Law to continue the business and that liabilities properly incurred in connection with such business would be binding upon the estate and it made no difference in the circumstances that she continued the trade not by herself alone but in partnership with the son-in-law.

26 Bom. 206 and 28 M.L.J. 696 relied on.

But where she had mortgaged the husband's estate and raised money to meet a number of small items of debts due to various persons in connection with the business, there being however no evidence that there was any pressure from these creditors, held that the mortgage was not justified and was not binding upon the reversioners.

14 A. 426 and 21 A. 71 applied.

A portion of the trade assets had been utilised by the widow in completing a godown which the husband had commenced. Held, on the principle of the decision in 26 Bom. 206 that the mortgagee as a creditor of the trade, was entitled to a charge on the godown to a proportionate amount as indicated by the proportion between the amount spent thereon after the husband's death and the total value of the godown.

S. Varadachariar and *K. S. Champakesa Aiyangar* for Appellants.

K. V. Sesha Aiyangar and *T. R. Ramachandran* for Respondents.

S.V.V.

Madhavan Nair, J., S.A. No. 1895 of 1926.
9th December, 1930.

Specific Relief Act, Art. 41—Transaction declared to be void—Compensation, when can be granted.

An alienation by a Mahomedan mother was declared void as against the share in the estate of her minor sons, but good to the extent of her own share in the property. It was found that the minor plaintiffs benefitted by the sale as debts binding on the father's estate were paid off by that sale.

N.R.C.

Held, that 30 Cal. 539 is itself an authority for the proposition that, though a transaction is declared to be void, the Court may under S. 41, Specific Relief Act require the party to whom relief is granted to make compensation to the other party which justice may require.

7 Lah. 35 followed.

25 C.W.N. 258 relied on.

Case-law discussed. Leave refused.

B. C. Seshachala Aiyar for Appellants.

A. Visvanatha Aiyar and *A. Ramaswami Aiyar* for Respondents.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. 394 of 1926.
15*th December,* 1930.

Limitation Act, Art. 182, *Cl.* (5)—*Unverified execution-petition—Vakil signing not aware of all the facts of the case—Application, if in accordance with law so as to support a later application for execution.*

An execution petition, which is not signed and verified by the decree-holder, but only signed by the vakil, who did not seem to be fully acquainted with the facts and circumstances of the case, cannot be said to be "in accordance with law," so as to support a later application for execution.

26 M. 101 followed.

31 M. 68 distinguished.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondent.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 238 of 1930.
17*th December,* 1930.

Civil Procedure Code, Order 21, *Rule* 89—*Execution sale—Judgment-debtor depositing money under Rule* 89—*Attachment before judgment between the sale and deposit—If attachment valid.*

In execution of his decree *A* purchased the suit properties in Court sale but before confirmation the judgment-debtor made the necessary deposit under O. 21, r. 89, by raising the amount by a private sale and the Court sale was thereupon set aside. Before the deposit but after the sale to *A, B* had those properties attached before judgment in his suit against the judgment-debtor.

Held, that the attachment was valid. By the mere sale the judgment-debtor did not lose all his interest in the properties before confirmation. Rules 86 and 87 indicate the meaning of the Code in this matter that the property is still the property of

the judgment-debtor, though on confirmation the title of the purchaser relates back to the date of the sale under S. 65.

1921 Mad. 498 and 44 Mad. 554 followed.

55 I.C. 526 distinguished on the ground that in that case as found from the records the sale had been confirmed.

The Munsif decided that the attachment was bad but on appeal the Subordinate Judge reversed and remanded it. On appeal to the High Court, it was contended that no appeal lay to the Subordinate Judge's Court.

Held, that even assuming that no appeal lay—without deciding it—the High Court could interfere with the order of the District Munsif direct in exercise of its revisional jurisdiction.

37 M.L.J. 100 followed.

Ch. Raghava Rao with *S. Rajaraman* for Appellant.

V. Suryanarayana for Respondents.

S.V.V.

Madhavan Nair, J. S.A. No. 2014 of 1927.
19th December, 1930.

Hindu Law—Suit for partition—Will and settlement by plaintiff before notice of suit was served—Whether valid.

S filed a suit for partition on 18th August, 1922, and on 15th September, 1922, settled some portions of his half share on two of his daughters and simultaneously executed a will with respect to the other properties. The summons in the suit was served on the co-sharers only on 16th September, 1922. *S* died on 1st April, 1924, pending the trial and the persons entitled under the settlement and the will were added as legal representatives after contest and a decree was passed for the half share in their favour.

Held, that inasmuch as severance is a matter of individual volition and does not depend on the assent of the co-sharers, it follows on principle that the severance can be brought about so far as the plaintiff is concerned by an assertion of his right to separate in the plaint. Notice to the other co-sharers of the plaintiff's intention to separate would be necessary to make the severance operative against them so that they may know that he is claiming his share of the joint family property from the date of the plaint and the severance is final; but it cannot be a condition precedent to bring about a severance of the joint family status so far as the plaintiff is concerned.

78 I.C. 256 followed.

39 M. 159; 39 A. 498; 45 M. 489; 50 Cal. 84 relied on.

Case-law discussed.

K. Rajah Aiyar and *K. Venkateswaran* for Appellant.

S. Rajagopalachari for Respondents.

S.V.V.

Venkatasubba Rao and
Madhavan Nair, JJ. C.M.P. No. 424 of 1930.
19th December, 1930.

Civil Procedure Code, S. 109, *Cl.* (c)—*Substantial and difficult question of law—If sufficient.*

There was no specific authority covering the point raised and the question was also a substantial question of law and one of some difficulty. The value of the suit was below Rs. 10,000.

Held, by Madhavan Nair, J., that the existence of a question of law of some difficulty for decision is not itself a sufficient ground for a certificate under S. 109, Cl. (*c*), Civil Procedure Code, especially where the question raised is not likely to affect any large number of persons, nor likely to be a precedent governing numerous other cases.

42 M.L.J. 78 and 18 I.C. 302, distinguished.

Venkatasubba Rao, J. was not prepared to differ in the result although his inclination was the other way.

S. Varadachariar and *T. M. Ramaswami Aiyar* for Petitioners.

K. R. Rangaswami Aiyangar for Respondent.

S.V.V.

Jackson, J. Cr. R.C. No. 367 of 1930.
19th December, 1930.

Criminal Procedure Code—Practice—Police investigating after a private complaint was taken cognizance of by the Magistrate—Police, if can investigate.

Merely because a private person has filed a complaint and that is taken cognizance of by the Magistrate, the jurisdiction of the police to investigate into the offence irrespective of the complaint, does not cease.

53 Bom. 339 not followed.

2 Pat. 379 approved.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioners.

Ch. Raghava Rao and *T. Krishnamachariar* for Complainant.

The Public Prosecutor for the Crown.

S.V.V.

The Chief Justice, Sundaram Chetty and Stone, JJ.
8th January, 1931.

In the matter of *an Advocate.*

Evidence Act (*I of* 1872), *S.* 41—*Terms "legal character" and "specific thing"—Meaning—Declaration of right as creditor of insolvent—Whether constitutes judgment* in rem.

An order of an Appellate Court in an insolvency proceeding declaring a person as the creditor of the insolvent does not confer on the creditor a "legal character" within the meaning of S. 41 of the Indian Evidence Act and the adjudication does not amount to a judgment ***in rem***. The term "legal character" in S. 41 means legal status.

Held, further, that the right to recover a debt is not a "specific thing" within the meaning of S. 41 and a decree declaring such a right does not have the effect of establishing the right absolutely, that is, as against the whole world and hence does not come under the definition of judgment ***in rem***. The term "specific thing" in the section means tangible property.

46 M.L.J. 580 relied on.

16 M. 380, 39 M. 80, 43 C. 694 (P.C.) and 33 I.C. 798 referred to.

S. Duraiswami Aiyar and *K. Sankaranarayana* for *The Advocate-General* in support of the notice to Advocate.

T. M. Krishnaswami Aiyar, M. Venkatasubbiah and *G. A. Pais* for Advocate.

B.V.V.

Madhavan Nair, J.
9th January, 1931.

S.A. No. 1591 of 1927.

Indian Limitation Act, Arts. 61 *and* 120—*Joint family—Partition—Debts due to the family allotted to members of a branch—Member of another branch collecting money from the debtor—Unauthorised expenditure by him on behalf of other members—Suit for moneys paid on behalf of them—Whether barred.*

The father of defendants 1 and 2, the father of plaintiff and 3rd defendant were brothers and members of a joint family. After the death of the father of defendants 1 and 2, a partition was effected in 1917 whereby some moneys due to the family from a third person were allotted to the share of defendants 1 and 2. The plaintiff collected a portion of that amount due from the debtor on the unauthorised power to spend them for the funeral expenses of the defendants' father and for income-tax purposes. But the defendants 1 and 2 filed a suit against the debtor and got a decree in 1922. The debtor in his turn brought a suit against the plaintiff for the moneys collected from him, and got a decree in 1923. The plaintiff brought a suit against

the defendants in 1924 for reimbursement of the amount disbursed by him on their behalf.

Held, that the moneys having been paid by the plaintiff on behalf of defendants in 1917 and the present suit being brought in 1924, Art. 61 and not Art. 120 of the Indian Limitation Act would be applicable and hence the plaintiff's suit was barred.

Ch. Raghava Rao for Appellant.

K. S. Desikan for Respondent.

K.C.

Madhavan Nair, J. S.A. No. 1666 of 1927.
9th January, 1931.

Indian Limitation Act, Arts. 142 *and* 144—*Suit for possession of waste land—Title and possession till date of trespass alleged—*Onus *of proving possession.*

In a suit for possession of waste land where the plaintiff alleges his title to the property and also specific possession till the date when the defendant trespassed upon the land, he cannot rely on the presumption that in the case of waste land possession must be deemed to be with the person who has title to the property and seek to apply Art. 144 of the Limitation Act and throw the *onus* of proving adverse possession on the defendant. To such a case Art. 142 applies and plaintiff has to prove possession within twelve years of the suit.

67 I.C. 673 followed.

The Advocate-General and *M. Venkatasubbiah* for Appellant.

S. Varadachariar, S. T. Srinivasagopalachari and *V. Ramaswami Aiyar* for Respondent.

K.C.

Madhavan Nair, J. C.R.P. No. 1207 of 1927.
16th January, 1931.

Madras Local Boards Act (XIV of 1920), *S.* 225—*Scope—Suit for declaration that levy of property tax was illegal and for refund—Notice if necessary.*

S. 225 of the Madras Local Boards Act applies only to suits for compensation or for damages. A suit for a declaration that the assessment of plaintiff to professional tax by the defendant Union Board is illegal and for recovery of the tax so paid is not one for compensation or damages and, therefore, does not require notice under the section.

32 M. 271 relied on.

M. S. Vaidyanatha Aiyar for Petitioner.

K. Bhashyam Aiyangar for Respondent.

B.V.V.

The Chief Justice, Reilly and Sundaram Chetty, JJ. *In the matter of* a first grade Pleader.
19*th January,* 1931.

Legal Practitioners Act (XVIII of 1879), *S.* 12 (*b*) *and* (*f*) *—Improper conduct—Pleader obtaining adjournment of case on grounds known to be false—Professional misconduct—Duty of legal practitioner to Court.*

Where a Pleader repeatedly applied for the adjournment of a case pending before a Sub-Magistrate on the ground that his client intended to apply to the High Court for a transfer of the case but it appeared that the pleader knew or had reason to believe that the purpose for which the adjournment was applied for would never be carried out,

Held, that under the circumstances the pleader was guilty of professional misconduct in having attempted to gain for his client an advantage by dishonest means.

Per *the Chief Justice.*—"It is not the duty of a legal practitioner to blindly follow every instruction his client gives him. The pleader not only has got a duty towards his client but has also got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted. He must not trick or deceive the Court or attempt to gain for his client an advantage by dishonest means. He must not ask for adjournment for his client when he knows that the reason put forward is untrue or has reason to believe to be untrue. He must apply only when he believes the reason to be well founded."

The Advocate-General in support of the "Notice" to Pleader.

L. A. Govindaraghava Aiyar and *P. S. Ramachandra Aiyar* for Pleader.

B.V.V.

Wallace and Stone, JJ. A.S. No. 200 of 1929.
19*th January,* 1931.

Evidence Act (I of 1872), *S.* 92*—Mortgage deed—Stipulation for default rate of interest—Subsequent oral agreement waiving default—Plea of discharge—Proof—Permissibility—Contract Act* (1872), *S.* 63.

A mortgage deed provided for interest at 7½ per cent. per annum on the principal amount. It further provided that the mortgagor should pay interest at 9 per cent. per annum in case the mortgagor committed default either in the regular payment of interest or in the repayment of the principal amount at the end of two years. The mortgagor committed default and the question as to interest payable was raised in a proceeding for apportionment

N.R.C.

of certain compensation amount. The mortgagor pleaded a subsequent oral agreement whereby the mortgagee agreed to waive the default rate of interest both for the past and for the future. He further averred that payments had been made in pursuance of the alleged agreement and that the entire claim for interest had thus been discharged.

Held, that S. 92 of the Indian Evidence Act was not a bar to the plea of discharge in pursuance of the agreement being raised as a defence, because there was no variance of the original contract but a mere remission of part payment of the debt. The contract pleaded was such as that specified in S. 63 of the Contract Act and was enforceable.

58 M.L.J. 503 approved.

52 M.L.J. 224 explained.

26 M. 195, 27 M. 368, 30 M. 231, 42 M. 42 (F.B.), 44 Bom. 55 and 55 M.L.J. 1 referred to.

K. S. Krishnaswami Aiyangar and *T. D. Srinivasachari* for Appellant.

P. Visvanatha Aiyar for Respondents.

B.V.V.

Wallace and Stone, JJ. A.S. Nos. 395 and 396 of 1928.
22nd January, 1931.

Appeal—Land Acquisition Act—Dispute as to title between two claimants—Decision by Chief Judge of Small Causes—If an award or a decree—Appeal to High Court, if lies.

Where the Government constituted the Chief Judge of the Small Cause Court as the officer to perform the functions of a "Court" under the Land Acquisition Act to hear and decide disputes between parties to the land acquisition proceedings, the Chief Judge is acting as a special judicial officer sitting in a Special Court specially constituted and not as a Principal Civil Court of Original Jurisdiction within the meaning of S. 3 (*d*) of the Act.

Where there was no dispute as to the quantum of compensation payable but only as to which of two claimants was entitled to it, the decision of the Court on the question is a "decree" and not an "award".

45 Mad. 320 applied.

A right of appeal must be expressly given by statute, 39 I.A. 197: 40 Cal 21: 23 M.L.J. 276 (P.C.) and as under S. 54 a right of appeal is given only from an award, no appeal lies to the High Court where there is no dispute as to the award but only as to the persons entitled to it. Appeal is given only against awards and not decrees of the Special Court.

T. C. A. Anandalwan, T. C. A. Bhashyam and *M. E. Rajagopalachari* for Appellant.

C. Narasimhachariar and *R. Rangaswami Aiyangar* for Respondent.

S.V.V.

Madhavan Nair, J. S.A. No. 2286 of 1927.
26th January, 1931.

Will—Construction—"On the death of both of us you should perform our obsequies and enjoy our properties absolutely"—"Will shall come into force after my life-time"—Effect of the two clauses —If legatee entitled to possession on testator's death.

By his will addressed to the devisee a testator stated as follows: "I have no sons or daughters, but only a wife. We have come under your protection. You are rendering us all *upacharams* (services). You should protect me and my wife in this very manner and *on the death of both of us* you should perform our obsequies and enjoy our properties with right to alienate by means of gift and sale. *This will shall come into force after my life-time*". The devisee was in possession of the properties. It was contended that the property in question vested in the devisee on testator's death and that the widow is entitled only to be maintained by him.

Held, that the vesting in the devisee takes effect only after the death of the testator and his widow. It cannot be held that there is no vesting of the properties in the widow. The vesting in her is implicit in the provision which makes the vesting of them in the devisee conditional on the death of the testator and his wife.

38 Mad. 369 at 373 distinguished.

G. N. Tirumalachari for Appellant.

T. R. Arunachalam for Respondent.

S.V.V.

Ramesam, J. S.A. No. 2276 of 1927.
27th January, 1931.

Natural mother—Whether guardian de jure*—Suit by an adopted son to recover properties alienated by natural guardian—Whether barred by limitation.*

The plaintiff who was given away in adoption to another, sued to recover properties purported to have been alienated by his natural mother acting as his guardian. On the question whether under the circumstances the natural mother can be regarded as a *de jure* guardian.

Held (1), that however much it may be desirable for a Court to appoint one or the other of the natural parents as the guardians when the adoptive parents are not available, it cannot be said that until appointment by Court the natural parents can be regarded as guardians *de jure*.

Case-law reviewed.

(2) That Art. 44 of the Limitation Act does not apply to the case.

Jagannada Doss for Appellant.

C. Sambasiva Rao for Respondents.

K.C.

Madhavan Nair, J. S.A. Nos. 1873 to 1875 of 1927.
28th January, 1931.

Inam—Dharmilla—Right of Zamindar to eject.

The original grant was not produced and there was scanty evidence of the Raja's right to recover possession except an intimation in the village account book to the "Nayalu" and "Karnam" village officers that certain *lands* have been granted for sircar service *Tirasthu* (personal services) and that they should allow the grantees to enjoy the produce of the lands with the permission of the sircar.

Held, the use of the word "land" did not necessarily imply that kudiwaram was granted, whereas the direction to permit the tenants to take the produce showed that only melwaram was granted. In view of this finding the question how far (1914) M.W.N. 179 and 18 M.L.T. 142 which rest on 23 M. 320 is good law after 41 M. 1012 and 43 M. 166 and C.M.A. No. 398 of 1924 left open.

The Advocate-General and *V. Govindarajachari* for Appellant.

Y. Suryanarayana for Respondent.

S.V.V.

Jackson, J.
21st January, 1931.

C.R.P. No. 1023 of 1930.

Criminal Procedure Code, S. 476—Complaint by Civil Court for perjury—No finding that it is "expedient in the interests of justice" that an inquiry should be made into the offence—Whether fatal to the prosecution.

The judgment-debtor filed a petition to enter partial satisfaction of the decree under O. 21, R. 2, Civil Procedure Code, filing a receipt evidencing a payment of Rs. 100. Decree-holder contended that he did not receive the money and did not give that receipt and sent a complaint to the Magistrate for perjury against the decree-holder.

Held, that the absence of a finding that it was in the interests of justice that a prosecution should be launched, was a mere irregularity which could be cured by S. 537, Criminal Procedure Code. If the complaint of the Munsif was bad, the order of the Sub-Court dismissing the appeal filed under S. 476, Criminal Procedure Code, might itself be treated as a proper complaint.

28 L.W. 774; (1928) M.W.N. 229 dissented from.

G. Sivaramakrishna Sastri for Petitioner.

A. Venkatasubba Rao and *A. V. Krishna Rao* for Respondent.

K.C.

The Chief Justice, Ramesam, Jackson, Anantakrishna Aiyar and Sundaram Chetty, JJ.
26th January, 1931.

Cr. M.P. No. 36 of 1931.

Criminal Procedure Code (*V of* 1898), *S. 7* (1)—*Scope—Sessions Division consisting of part of a district—Notification of Government regarding same—Validity.*

The principle of S. 7 (1), Criminal Procedure Code, is that a Sessions Division should be equivalent to a whole district or a number of whole districts without having a fraction. Consequently the constitution of two Sessions Divisions each consisting of a full District, namely, East Tanjore District and West Tanjore District, does not offend any section and the Government Notification constituting such divisions is not *ultra vires.*

10 Bom. 374 referred to.

Per *Jackson, J., dissenting.*—The Government Notification did not create two districts in the place of the old unified district of Tanjore and each of the Sessions Divisions newly constituted therefore consisted of part of a district. The Notification establishing such new Sessions Divisions was consequently *ultra vires.*

30 Mad. 136 relied on.

N.R.C.

K. S. Jayarama Aiyar, S. Nagaraja Aiyar and *G. Gopalaswami* for Petitioner.

The Advocate-General (*A. Krishnaswami Aiyar*) for the Government.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

B.V.V.

Curgenven and Cornish, JJ. A.S. No. 214 of 1929.
28th January, 1931.

Hindu Law—Widow—Mortgage by—Consideration, payment of a decree on a prior mortgage—Right to sue for a declaration in respect of the prior mortgage barred—Later mortgage, if can be questioned—Rights and duties of widow in respect of payments of husband's debts.

A widow mortgaged her husband's property in 1897 to raise money to pay off alleged debts due by her husband. In 1912 a suit was brought upon it for balance alleged to be due and was decreed. To pay off this decree amount the suit mortgage was alleged to be executed in 1914. The suit was filed by the reversioners in 1925 for a declaration that the mortgage of 1914 was not binding as against the reversion and it was contended that it stood in no better position than the prior mortgage and the decree thereon and that if it could be shown that the earlier mortgage and decree were attributable to the widow's improvidence in alienating property to pay debts which could and ought to have been discharged from the income in her hands, at least with regard to the interest, the reversioners would not be bound thereby.

Held, that to allow the plaintiffs now to open the question of the binding character of the previous alienation and the decree following upon it would, in effect, remove the bar which the Limitation Act has placed in their way. The plaintiffs would thereby be doing indirectly what they cannot do directly and cannot therefore be allowed to re-open it.

11 I.C. 392, 14 A.W.N. 137 and 58 M.L.J. 417 followed.

A widow is not bound to discharge her husband's debts out of the income of his estate; but she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognised in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debt, or the alienee, after reasonable enquiry, *bona fide* believed that the alienation was necessary, he will be protected.

(1913) M.W.N. 275: 18 I.C. 275 and (1914) M.W.N. 488: 24 I.C. 534 referred to.

S. Varadachariar and *R. Rajagopala Aiyangar* for Appellants.

The Advocate-General, S. Jagadisa Aiyar, S. Nagaraja Aiyar and *N. Somasundaram* for Respondents.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ.
28th January, 1931.

C.M.A. No. 265 of 1930.

Res judicata—*Co-defendants—Compromise decree in a representative suit—If* res judicata *against those not* eo nomine *parties but represented in the prior suit.*

One *L* brought a suit as kudiwaramdar of lands in a village claiming to be entitled to the produce of fish caught in the tanks in the village along with the other kudiwaramdars in the village, a few of whom were made parties as representing others also under O. 1, R. 8, Civil Procedure Code. One *R* claiming to be a pannaidar in the village brought himself on record as 15th defendant in the suit and contended that he was also entitled to a share in the fish and that the shares were determinable not on the basis of karai as *L* and some defendants claimed, nor on *per capita* basis as other defendants claimed, but in proportion to the extent of land held by each claimant. It was compromised and decreed to the effect that the division should be according to the extent and in determining the plaintiff's share, the extent of *R's* pannai land was also taken into account. *R* brought the present suit against the kudiwaramdars of the village claiming (1) his right to the fish, and (2) kudiwaram right in his pannai land. Some of the defendants herein were not *eo nomine* parties to the prior suit by *L*, though they should be deemed to be represented by the representative kudiwaramdars.

Held, that three conditions at least must be satisfied for a plea of *res judicata* between co-defendants.

(1) There must have been a real conflict of interests between the co-defendants in question,

(2) There must have been a determination of the rights of those defendants *inter se*, and

(3) That determination must have been necessary in order to give the plaintiff the relief which he got in that suit.

Per *Anantakrishna Aiyar, J.*—In some cases another test has also been applied, even when the above three are satisfied, namely, the appeal test. But, the question left open, as in this case that was satisfied.

The question whether *R* was holder of pannai land was necessary for the determination of plaintiff's share in the prior suit and to that extent it will be *res judicata*, but not the question whether he has or has not kudiwaram rights in those lands.

A decree in a compromise suit, if otherwise proper, is as much binding as a decree on contest even on those not *eo nomine* parties but who were represented by their representatives.

24 M.L.J. 192; 18 L.W. 177 followed.

The remarks in 10 Lah. 75 (P.C.) also seem to imply that it will operate as *res judicata.*

Observations of Sadasiva Aiyar, J., in 38 M. 851 not followed as *obiter.*

Jenkins v. *Robertson,* (1867) L.R. 1 H.L. Sc. and Div. 117, doubted even in England and not applicable in this country.

T. M. Ramaswami Aiyar for Appellant.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondents.

S.V.V.

Curgenven and Cornish, JJ. O.S.A. No. 90 of 1930.
29th January, 1931.

*Company—Articles of Association—Provision for election of Directors—Nature of taking of poll—*Ultra vires *act of Directors—Ratification by majority of shareholders—Individual right of shareholder regarding right to vote infringed—Power of Civil Court to interfere—Meaning of expression "casual vacancy".*

Where there is no adequate remedy open to the shareholder under the Articles of Association, the Court has jurisdiction to entertain a suit by the shareholders as against the Directors and the Company in respect of their individual rights as shareholders. The infringement of the shareholder's right to vote at a meeting held for the purpose of electing Directors is actionable. In such a case a majority of the general body of shareholders cannot by a resolution override the Articles which require Directors to be elected and resolve that certain persons having contrived to step into office without election shall continue there.

An assembly of shareholders for the purpose of recording their votes at a poll is not a general meeting. The legal conception of the meeting continuing is only for the purpose of taking the poll.

A casual vacancy in the directorate means any vacancy not arising by efluxion of time.

V. V. Srinivasa Aiyangar, K. Venkataramani, S. Parthasarathi and *V. K. Thiruvenkatachari* for Appellants.

T. R. Venkatarama Sastri, K. Narasimha Aiyangar and *N. Rajagopala Aiyangar* for 1st and 2nd Respondents.

~~*K. S. Rajagopala Aiyangar, V. C. Gopalaratnam, V. Sankaran,*~~ *U. Ramachandran* and *S. Panchapakesa Sastri* for other Respondents.

B.V.V.

Krishnan Pandalai, J.
3rd February, 1931.

C.R.P. No. 1416 of 1927.

Civil Procedure Code (*V of* 1908), *O.* 21, *Rr.* 89, 92 (2) *and* 93—*Execution sale—Application for rateable distribution by other creditors—Order for rateable distribution passed—Subsequent application under R.* 89 *by mortgagee of properties sold—Sale confirmed by executing Court but set aside in appeal—Other creditors whether entitled to notice—Purchaser's right to obtain restitution.*

In execution of a money decree certain immoveable properties of the judgment-debtors were attached and sold. But before the sale took place certain other decree-holders put in execution petitions and obtained orders for execution and for rateable distribution. The sale proceeds were distributed rateably among the several decree-holders. A person who had obtained a mortgage of the properties subsequent to the attachment but before the sale put in an application under O. 21, R. 89, Civil Procedure Code, for setting aside the sale after depositing the amount due under the decree in execution of which the property had been sold together with five per cent. of the purchase-money. The application was dismissed by the executing Court but the High Court on appeal set aside the sale. (*See* 52 M.L.J. 157.) It appeared that the creditors who had applied for rateable distribution were not made parties to the appeal to the High Court and that no notice had been issued to them. The purchaser having applied under O. 21, R. 93 for restitution and for return of the money which had been rateably distributed,

Held, that the persons who had applied for rateable distribution were not "persons affected" within the meaning of R. 92 (2) of O. 21 and were not entitled to notice thereunder. The order setting aside the sale could not consequently be impeached on the ground of want of notice.

Held, further, that assuming notice to the rateable creditors was necessary, the omission to issue the same was a mere irregularity and the Court could dispose of the case as though the original petition under O. 21, R. 89 was still pending. The purchaser was consequently entitled to get back the purchase-money with interest as also the five per cent. deposit from the persons who had received the several amounts.

35 M.L.J. 604 distinguished.

B. Sitarama Rao and *P. Kameswara Rao* for Petitioner.

G. Lakshmanna, P. Somasundaram, T. Ramachandra Rao and *C. Rama Rao* for Respondents.

B.V.V.

Jackson, J. C.M.S.A. No. 129 of 1926.
3rd February, 1931.

Appeal—Claim order falling under S. 47 but in execution of a decree of Small Cause Court—Whether second appeal lies.

A decree was passed by a Court in a suit of the nature cognizable by a Small Cause Court. In execution of that decree, certain properties were attached. A claim was preferred against it and as the order on it was one falling under S. 47, an appeal was filed. As against the Appellate Court's order a second appeal was filed to the High Court,

Held, no second appeal lay, the test being what is the nature of the suit in which the decree was passed and not the nature of the proceedings in execution.

30 Bom. L.R. 1447 followed.

P. Satyanarayana Rao for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Jackson, J. Cr. R C. No. 337 of 1930.
27th January, 1931.

Defamation—Publication to a co-conspirator—If amounts to publication.

It was complained that the petitioners conspired with one *A*, the President of a Union Board and maliciously got up a petition to the effect that the complainant—a candidate for election to the Board—was suffering from leprosy.

Held, that the President was accused of being one of the conspirators and therefore publication to the President—a co-conspirator—was no publication. "If *A* and *B* conspire to draw up a document defaming *Z* and leave it with *B*, there is no publication."

V. L. Ethiraj, T. R. Ramachandra Aiyar, A. S. Mannadi Nair, K R. Venkatrama Sarma and *S. R. Dikshit* for Petitioners.

The Public Prosecutor for the Crown.

L. A. Govindaraghava Aiyar and *S. A. Seshadri Aiyangar* for Complainant-Respondent.

S.V.V.

Curgenven and Cornish, JJ. A.S. No. 286 of 1928.
5th February, 1931.

Will—Construction—Charges in favour of charities and maintenance—Surplus more than half to the legatee—Whether trust created—Blending of joint property—Proof.

A testator bequeathed certain properties in favour of *P* and provided that *P* shall enjoy the immoveable property and from its income shall expend annually certain quantities of paddy and of cash towards the upkeep of specified ceremonies and charities and pay certain maintenance to his widow. *P* died leaving two sons, who were members of a joint Hindu family. The income from these properties were kept together with the income from coparcenary properties.

Held, that even if the will gave only a life-interest to *P*, the sons took it as tenants-in-common. There was no trust created but *P* took it subject to the charges in favour of the charities and the maintenance holder. To rebut the construction of a trust, it is sufficient if it contains a bequest of surplus property for the use and benefit of private persons, especially where the charges swallow only about half the income.

8 M.I.A. 66 and 5 Cal. 438 referred to.

40 M. 116 distinguished as a case of a wakf.

The onus of establishing a clear intention to blend is on the party who asserts it. Where property exclusively owned by one member is blended the intention becomes clear enough. But when it is joint property, even if the income from all their property was kept together, such a course is hardly incompatible with

the matter of the ownership and clearer proof of intention to blend is therefore necessary.

K. Narasimha Aiyangar for Appellant.

T. L. Venkatarama Aiyar for Respondent.

S.V.V.

Krishnan Pandalai, J. S.A. No. 2362 of 1927.
10th February, 1931.

Res judicata—*Suit by jewel custodians of a temple against trustees—Claim for a higher-rate of rice measures—Previous suits between trustees and jewel custodians in which all the present plaintiffs except one were not parties—Question substantially and distinctly decided.*

The trustees of a temple were sued by the respondents who were jewel custodian mirasidars for their emoluments. The emoluments were mentioned as 3 measures of rice by the old standard, but which amounted to 3¾ new measures owing to the reduction by Government in the capacity of measures. Hence they claimed more. In two previous suits against the trustees by the jewel custodians as plaintiffs in which all the present respondents were not parties except the 1st respondent, who was only impleaded as one of the defendants in those suits, the point in issue now, had necessarily to be decided in order to find out the quantity of rice to be decreed and their decision was, that the then plaintiffs (jewel custodians) were entitled only to 3 current measures. On the question whether these judgments operated as *res judicata,*

Held, that the decision as to respondents being entitled only to rice on the footing of 3 new measures per day, was *res judicata* by the judgments in the previous suits.

Where persons are litigating in respect of a common right in which they are all interested, some of whom are arrayed as plaintiffs and the rest as co-defendants along with the opposite party who is opposing the common claim, in such a case, although disputes may exist *inter se* between the plaintiffs and co-defendants either as to the quality or quantity of their respective interests in the common right, such disputes do not concern the main question in litigation between them on the one hand and their common opponent on the other, and the result of a *bona fide* suit of such a character is binding, as to what was directly and substantially decided, on all the persons interested in the common right.

Whether they were plaintiffs or co-defendants, the question of the measure according to which the rice was payable was distinctly raised and decided in favour of the trustees.

K. Balasubrahmania Aiyar for Appellants.

K. S. Krishnaswami Aiyangar and *N. Srinivasa Aiyangar* for Respondents.

K.C.

Krishnan Pandalai, J. S.A. Nos. 1104 and 1313 of 1929.
10th February, 1931.

Madras Local Boards Act (XIV of 1920), *S. 79* (2)—*Inam lands—Mode of assessing value for levying land-cess.*

Under the Madras Local Boards Act, 1920, when once the District Board has issued a notification regarding the levy of land-cess the Collector is entitled to levy the cess on inam lands taking their value on the basis of the revenue which they would have paid if they were not inam at the time of the notification. In such a case the actual rental realised by the inamdar from his tenants cannot be taken as the basis for fixing the value of the inam lands.

Provisions in Madras Local Boards Act relating to the levy of land-cess considered.

P. S. Narayanaswami Aiyar and *K. V. Srinivasa Aiyar* for Appellants.

The Government Pleader (*P. Venkataramana Rao*) for Respondent.

B.V.V.

Krishnan Pandalai, J. S.A. No. 2340 of 1927.
11th February, 1931.

Hindu Law—Suit against one member of a joint Hindu family—Attachment before judgment during the lifetime of the defendant—Death of the defendant before decree—Operation of survivorship.

Where the share of a Hindu coparcener in undivided family property was attached before judgment in a suit brought against him in his individual capacity, but the decree was passed only after his death,

Held, that the attachment would not prevent the accrual of title by survivorship to the other coparceners, unless the decree was also passed during that coparcener's lifetime.

17 M. 144 followed.

26 M.L.J. 517 and 26 M. 604 distinguished as cases where the decree also was passed during the coparcener's lifetime.

S. Varadachariar and *C. S. Swaminathan* for Appellant.

T. R. Venkatarama Sastriar and *M. Murugappa Chettiar* for Respondent.

S.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 433 of 1926.
12th February, 1931.

Civil Procedure Code (V of 1908), *S. 144—Costs paid under decree of Trial Court—Decree reversed in appeal—Order for restitution—Interest on costs whether can be awarded.*

N.R.C.

Where costs were paid to the respondent in an appeal as per decree of the first Court, which decree was reversed in appeal and thereupon the appellant applied for restitution of the amount of costs paid,

Held, that under S. 144, Civil Procedure Code, the Court could, in passing an order for restitution, direct the respondent to pay interest on the amount of costs which he had realised under the decree of the Trial Court. Interest was awarded at 6 per cent. per annum.

63 I.C. 513 followed.

3 Cal. 162 distinguished as a case before the enactment of S. 144.

P. N. Appuswami Aiyar for Appellant.

T. Krishnaswami Aiyangar and *S. K. Narasimhachari* for Respondent.

S.V.V.

Jackson, J. Cr. R. P. No. 555 of 1930.
13*th February,* 1931.

Criminal Procedure Code, Ss. 342 *and* 537—*Non-compliance with S.* 342 *if an illegality vitiating the trial or a mere irregularity which can be cured by S.* 537.

Where after the defence closed its case in a criminal trial, fresh evidence for the prosecution was recorded and there was no fresh examination of the accused under S. 342 of the Code,

Held, that the non-compliance with S. 342 was not an illegality, that in each case of non-compliance with mandatory provisions of the Code it should be proved as a fact that the non-compliance occasioned a failure of justice or caused prejudice to the accused before the conviction could be set aside on the ground of illegality of the trial.

53 M. 937 applied and followed.

1930 M.W.N. 914 and 46 M. 449 (F.B.) pointed out to be no longer good law.

Kasturi Seshagiri Rao for Petitioners.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

K.C.

Krishnan Pandalai, J. S.A. No. 1051 of 1921.
18*th February,* 1931.

Civil Procedure Code (*V of* 1908), *S.* 47—*Portion of the plaint in a suit falling under S.* 47—*Court, if can convert that part into an execution petition under S.* 47.

A suit was filed for certain reliefs with regard to two items of property. As regards one of them, the proper course was to apply in execution and ask the Court to carry out its own order. In an application to convert the plaint into an execution proceed

ing, it was contended that a proceeding can be treated either as a petition or as a suit and not as both and that as such there can be no partial conversion under S. 47 (2).

Held, that permission can be given to convert a portion of the plaint. There is no doubt an observation *contra* in 1 L.W. 443 at 445, but on the facts it was not the ground of decision nor necessary for it.

C. Rangaswami for Appellant.

N. Swaminatha Aiyar for Respondent.

S.V.V.

Reilly and Ananta-krishna Aiyar, JJ.
18th February, 1931.

C.M.A. No. 459 of 1930.

Guardians and Wards Act (1890), *S.* 9—*Appointment of guardian of minor—Person living outside British India—Whether can be appointed.*

It is clearly against the intention of the Guardians and Wards Act that anybody outside British India should be appointed guardian of a minor boy living in British India.

22 M.L.J. 68 followed.

K. Rajah Aiyar and *S. Narasinga Rao* for Appellant.

S. Varadachariar and *S. V. Venugopalachari* for Respondent.

B.V.V.

Wallace and Stone, JJ.
24th February, 1931.

Appeal No. 412 of 1929.

Hindu Law—Widow—Possession of a portion of joint family property—Dissipation by her on third parties—Claim of maintenance—Whether allowable.

Where a widow has had or ought to have still in her hands a sufficient portion of joint family property to give her the rate of maintenance claimed by her and even if she has dissipated it, that does not afford her a legal claim on the balance of the joint family property in the hands of the defendants who are her own son and grandson.

As the amount which ought to be with her available for her maintenance has, on her own showing, been mostly dissipated on third parties and is not now with her and therefore cannot be made in the suit the subject of a charge, she cannot claim maintenance.

33 Bom. 50 and 26 I.C. 430 referred to.

T. M. Krishnaswami Aiyar, R. Visvanatha Aiyar and *S. Thyagaraja Aiyar* for Appellants.

V. V. Srinivasa Aiyangar and *K. Venkataramani* for Respondent.

K.C.

Jackson, J. C.R.P. No. 1691 of 1930.
26th February, 1931.

Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 63—*Suit under—Declaration in favour of one decree-holder—Whether enures for benefit of another decree-holder—Non-compliance with rule of law—Interference by High Court in revision.*

A suit under O. 21, R. 63, Civil Procedure Code, is not a representative suit. Consequently, a declaration obtained by one decree-holder that certain properties can be attached in execution cannot enure for the benefit of another decree-holder who has allowed an adverse order in claim proceedings in respect of the same properties to become final by his failure to institute a suit.

42 Mad. 143 relied on.

12 W.R. 221 distinguished.

Where a clear provision of law has been violated the High Court can interfere in revision and the aggrieved party need not be driven to a fresh suit.

N. S. Srinivasa Aiyar for Petitioner.

G. Ramakrishna Aiyar and *C. Srinivasachari* for Respondents.

B.V.V.

Madhavan Nair, J. Application Nos. 860 of 1930 and 244 of 1931
3rd March, 1931. in C.S. No. 229 of 1924.

Mortgage—Suit on mortgage by deposit of title-deeds—Appointment of receiver—Collections made by receiver—Whether enure for benefit of mortgagee—Supervening insolvency of mortgagor—Effect.

During the pendency of a suit to enforce a mortgage by deposit of title-deeds, the Court appointed a receiver of the mortgaged properties at the instance of the plaintiff with a direction that the net income should be paid into Court to the credit of the suit. Subsequently, the suit was decreed, but the sale proceeds of the properties were found insufficient to satisfy the decree-debt. The mortgagor having been adjudged insolvent during the pendency of the suit, the decree-holder sought his remedy against the collections made by the receiver.

Held, that the mortgagee decree-holder was entitled to so much of the collections in the receiver's hands as will make up the deficiency, and that the supervening insolvency of the mortgagor did not affect the right of the mortgagee in that respect.

High on Receivers, S. 643, 14 C.L.J. 526 and 47 Cal. 418 relied on.

The Advocate-General (*A. Krishnaswami Aiyar*), *M. Subbaroya Aiyar* and *T. V. Viswanatha Aiyar* for Petitioner.

S. Duraiswami Aiyar and *V. Balaraman* for 3rd Respondent.

C. Krishnaswami Aiyar for the Official Assignee.

B.V.V.

Sundaram Chetty, J. C.R.P. No. 1633 of 1929.
17th February, 1931.

Civil Procedure Code (*V of* 1908), *O.* 1, *R.* 8—*Limitation Act* (*IX of* 1908), *Art.* 181—*Death of sole plaintiff on record—Suit, if abates—Right of other members of the community to continue—Period within which to apply—Dismissal before such application, if a nullity.*

Where a representative suit was filed on behalf of a community by a particular individual thereof, who died, but no other member of the community applied to continue the suit, whereupon the Court having waited for over six months since the death of the sole plaintiff, dismissed the suit on the ground that it cannot wait any longer, but subsequent to the dismissal, on the application of certain other members of the community, added them as parties to the suit and directed the suit to be continued,

Held, (*i*) that a representative suit does not abate on the death of the plaintiff on record,

(*ii*) that on such death the other members of the community had 3 years to apply to continue the suit under Art. 181 of the Indian Limitation Act. 41 I.C. 268 followed and 11 M.L.T. 257 referred to, and

(*iii*) that the dismissal of the suit without waiting for 3 years was a nullity and not a valid dismissal for default and did not require to be set aside and the suit may therefore be continued. 53 Cal. 844 referred to.

Watrap S. Subramania Aiyar and *T. P. Gopalakrishnan* for Petitioners.

A. V. Narayanaswami Aiyar for Respondents.

K.C.

Krishnan Pandalai, J. S. A. No. 2005 of 1931.
17th February, 1931.

Mortgage—"Salusari" *interest—Meaning—Instalment bond*—Post diem *interest—Right of creditor to appropriate payments.*

The word *"salusari"* interest in a mortgage bond means simple interest and not compound interest with annual rests.

In the case of an instalment bond where no *post diem* interest is specifically provided for the Court may presume simple interest at the contract rate. 7 Pat. 305 (P.C.) relied on.

Where the payments endorsed on the bond do not specify appropriation towards principal it is open to the creditor to appropriate the payments to his best advantage, namely, towards interest first and then towards principal.

B. T. M. Raghavachari for Appellants.

P. Somasundaram for Respondents.

B.V.V.

N.R.C.

Jackson, J. Cr. R.C. Nos. 730, 754 and 773 of 1930.
17th February, 1931.

Madras Salt Act (1889), *S.* 74 *(f)—Procedure in salt cases—Police charge-sheet—Legality.*

The Madras Salt and Abkari Acts do not purport to lay down a self-contained procedure for dealing with the offences therein specified so as to exclude the ordinary procedure laid down in the Criminal Procedure Code. A charge-sheet by the Police for an offence under the Act is therefore quite legal.

44 M.L.J. 231 and 48 M.L.J. 605 referred to.

K. S. Jayarama Aiyar, V. L. Ethiraj, G. Lakshmanna and *B. T. M. Raghavachari* for Petitioners.

The Advocate-General (*A. Krishnaswami Aiyar*) and *The Public Prosecutor* for the Crown.

B.V.V.

Sundaram Chetty, J. C. R. P. No. 831 of 1930.
25th February, 1931.

Court Fees Act—Suit for redemption—Usufructuary mortgage—Claim for account of surplus profits—Court-fee if payable on principal or on estimated profits also—Value for jurisdiction purposes.

The mortgagor of an usufructuary mortgage filed a suit to recover possession of the immoveable property mortgaged with an account of the surplus profits collected by the mortgagee. The principal amount was Rs. 1,500 and the profits were estimated at Rs. 5,654. Court-fee was paid only on the principal under S. 7, cl. (9), Court Fees Act, but the suit was filed in the Sub-Court.

Held, that a suit for redemption is a suit not only for recovery of possession of property but also of surplus profits due to the mortgagor (I. L. R. 12 A. 471 and I. L. R. 45 A. 154). The suit is really to recover possession and the right to recover profits is incidental to that right and not distinct and as such, Court-fee is payable only on the principal amount. In a usufructuary mortgage especially, not only the corpus but also future profits should be taken to have been secured in favour of the mortgagee. In that sense the property mortgaged will be the corpus and the profits.

12 M.L.T. 493 discussed and doubted.

A suit for redemption is not a suit covered by S. 8 of the Suits Valuation Act nor is it one of those suits in respect of which the Local Government can make rules for determining the jurisdiction value under S. 3. But the question is covered by authority so far as this Court is concerned that the value for Court-fees and juris-

diction shall be the same and the suit should therefore have been filed in the Munsif's Court.

5 Mad. 284 (F.B.) and 39 Mad. 447 followed.

Y. Suryanarayana for Petitioner.

P. Somasundaram for Respondent.

S.V.V.

Curgenven and Cornish, JJ. A. S. No. 210 of 1930.
4th March, 1931.

Madras Hindu Religious Endowments Act (1925), *S.* 73 (2) *—Scope—Suit for declaration of plaintiff's rights as hereditary trustee—Sanction of Board if necessary—Meaning of words "except as provided for in the Act" in S.* 73 (2).

A suit for a declaration that the plaintiff is the hereditary trustee of a temple and that the appointment of another person in his place by the temple committee was illegal is not one relating to administration and management of the temple within the meaning of S. 73 (2) of the Madras Hindu Religious Endowments Act and is therefore maintainable even without the sanction of the Religious Endowments Board. Scope of S. 73 (2) discussed.

45 Mad. 113 and 97 I.C. 480 relied on.

The effect of the words "except as provided for in this Act" in S. 73 (2) is that no suit can be maintained contrary to the provisions of the Act and not that a suit is not maintainable unless provided for in the Act.

C. S. Venkatachari, V. N. Venkatavaradachari and *R. Gopalachari* for Appellant.

E. S. Chidambaram Pillai and *C. Rangaswami Aiyangar* for 1st Respondent.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for 2nd Respondent.

B.V.V.

ORIGINAL SIDE.

Madhavan Nair, J. O.P. No. 267 of 1928.
6th March, 1931. Appn. No. 1890 of 1930.

Indian Companies Act, Ss. 169, 171, 229*—Presidency Towns Insolvency Act, S.* 53*—Decree-holder of the Company —Attachment of articles in execution—Court sale fixed—Petition to wind-up Company by a creditor—Stay of sale and appointment of Official Liquidator—Sale of articles by him and proceeds realised—Decree-holder's claim—Whether entitled to priority—Discretion of Court whether fettered in passing such orders.*

In a suit against a Company for rent, past and future mesne profits, a decree was passed in favour of the plaintiffs (the applicants herein) who in execution thereof attached machinery and other articles of the Company and had them removed to Court. When the articles were ordered to be sold by the Court and the actual date of sale was fixed, a few days previous to it, a creditor of the Company filed a petition for winding up the Company and for stay of sale of properties. The Judge sitting in Chambers appointed an Official Liquidator, and gave him custody of the articles of the Company and said "I decide nothing as to the rights of attaching creditors to priority". The Liquidator sold the goods and realised the proceeds. The petitioners in this application as decree-holders claimed that the nett sale proceeds in the hands of the Official Liquidator were subject to the said attachment and that they had priority over other creditors in the liquidation proceedings with respect to their decree amount. On the question whether S. 229 of the Indian Companies Act, read with S. 53 of the Presidency Towns Insolvency Act would fetter the discretion of the Court in passing orders under S. 169 of the Act, in favour of attaching creditors if it thinks such orders are justified by the circumstances of the case,

Held, that S. 229 is not to be construed in such a way as to fetter the discretion allowed to the Court under Ss. 169 and 171 of the Indian Companies Act. 16 Ch. D. 337 referred to and 31 Bom. L.R. 1209 applied.

The power under the section 229 has to be judiciously exercised having regard to the circumstances of the case. (S. 229 of the Indian Act corresponds to S. 201 of English Act.) 43 E.R. 839 referred to.

The interest of general creditors need not be preferred to those of particular creditors.

That, as no unfair proceedings of any kind could be ascribed to the applicants, they should be given the relief they asked for and the Official Liquidator should pay them the balance of sale proceeds in his hands towards the decree amount.

G. Ramakrishna Aiyar for Applicants.

S. Venugopalachari for Official Liquidator.

K.C.

Curgenven and Cornish, JJ. A.S. No. 108 of 1929.
5th March, 1931.

Undue influence—Creditor purchasing property—Vendor in need of money, if enough to affect the transaction with undue influence.

A Hindu father executed a sale for paying off Rs. 10,000 due on a first mortgage and Rs. 5,000 due on a second mortgage over the properties. The second mortgagee had obtained a decree on his mortgage and also instituted criminal proceedings against the mortgagor for having stated that there were no prior encumbrances on the property. It was contended that the sale was vitiated by undue influence in that the vendee took advantage of his own debt and other indebtedness and worked upon the father's fear that he would be convicted if he did not discharge the second mortgage and thereby secured the property at an unduly low figure.

Held, that it is the relationship between the parties and not the unconscionableness of the bargain that has first to be considered. Mere fact that the vendor was in urgent need of money is no sufficient ground for an affirmative finding on this point; nor can it be said that merely because the purchaser happens to be the creditor, he is in such a position as to dominate on the seller.

3 P. 279; 34 Cal. 150; 26 L.W. 147 and 43 Mad. 546 referred to.

Where hundreds of acres are sold in one block, it is not proper in considering the adequacy of the sale price to calculate by taking the value of the lands in small blocks and totalling them up.

16 L.W. 478 relied on.

The plaint contained another allegation that at the time when the sale-deed was executed the parties to it entered into an oral agreement whereby the vendee was to sell such portion of the property as was required to pay the debts and to restore the balance to his vendor. *Held* this is quite incompatible with the case of undue influence.

P. Somasundaram for Appellant.

G. Lakshmanna, P. V. Vallabhacharlu and *G. Chandrasekhara Sastri* for Respondent.

S.V.V.

Wallace and Stone, JJ. A.S. Nos. 333 and 365 of 1929
5th March, 1931. and 77 of 1930.

Land acquisition—"Market value," meaning of—Value of pathways, ponds, etc., how to be calculated.

Where lands acquired under the Land Acquisition Act consisted of three categories of lands, namely, (1) Strips of land forming pathways, (2) Bits of land forming the beds of ponds,

N.R.C.

and (3) Lands in which the claimant was entitled to melwaram right, and it was claimed that in respect of all these categories, the Court should first ascertain the market value of the whole block of land including the pathways and the pond as fit for building sites and then make a deduction respectively for (1) the restriction by reason of the easement of way, (2) the expenses of filling up the pond, and (3) the value of the kudivaram right of the occupancy tenants,

Held, that though this might be the correct procedure according to the decisions in 42 Mad. 644, 51 All. 765 and (1914) A.C. 576, such a course was not permissible in the present case as there were no materials to evaluate the compensation on this basis because before the Land Acquisition Officer the claim had been made for three separate categories separately and both before him and the Lower Court, the valuation had proceeded on such separate basis.

In the circumstances it was impossible to hold that the strips of land forming the pathways had any market value as building sites or even as agricultural lands.

25 Cal. 194 at 202 (P.C.) and 46 Mad. 789 relied on.

The compensation is to be paid with reference to the value of the land to the owner as on the date of the notification, including compensation for prospective advantages and subject to deductions for restrictions on the property. The value to the taker is not the test nor can the Court take into consideration the circumstances that may be brought about as a result of the acquisition.

L.R. 6 Q B. 42 and (1914) A.C. 576 referred to.

The Government Pleader for Appellant.

S. Varadachariar, C. Narasimhachari and *M. E. Rajagopalachari* for Respondent.

S.V.V.

The Chief Justice, Ramesam, Reilly, L.P.A. No. 70 of 1926.
Anantakrishna Aiyar and Sundaram Chetty, JJ.
11th March, 1931.

Civil Procedure Code (*V of* 1908), *O.* 20, *R.* 12—*Mesne profits —Decree silent regarding interest—Power of executing Court to award interest on mesne profits.*

Where a decree of Court which awards mesne profits under R. 12 of O. 20, Civil Procedure Code, is silent as to interest it is not open to the executing Court to fix the rate of interest and to execute the decree after allowing interest.

53 M.L.J. 619 dissented from; 27 C. 951 (P.C.) explained.

6 C.L.J. 462 and 30 C.L.J. 205 referred to.

Per *Reilly, J.*—It is the duty of the Court passing a decree to make its intention in the matter of interest so clear that there is

no room for interpretation. Where the intention is not clearly expressed it is the duty of the executing Court to ascertain that intention by interpretation. Even if the decree is "silent as to interest" in the sense that the word "interest" does not appear in it nevertheless if by the use of the expression "mesne profits" combined with a reference to the rate of interest, etc., the decree indicates that interest is awarded the executing Court should give it at six per cent. per annum, there being no rate mentioned. This result however must be arrived by construing the decree and not by use of any discretion vested in the executing Court. There may be other cases in which the "silence" in the decree may itself amount to a refusal to grant interest.

K. P. Raman Menon for Appellant.

K. P. Krishna Menon for Respondent.

B.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 105 of 1927.
11th March, 1931.

Provincial Insolvency Act (V of 1920), Ss. 48 (2) and 67—Payment of creditors in full—Ultimate surplus—Rate of interest from date of adjudication down to date of payment—Right of creditor to claim contract rate.

Where after the proved debts have been paid in full there is an ultimate surplus of the insolvent's assets, the creditor is entitled to claim interest at the contract rate from the date of adjudication till the date of payment, provided the rate is above six per cent. and the Court has not disallowed the same on other grounds. The proviso in S. 48 (2) of the Provincial Insolvency Act should be read along with the words "after payment in full of his creditors" in S. 67 of the Act so as to mean that the creditor's right to the contract rate of interest is preserved unless it has been disallowed.

24 A.L.J. 441 not followed.

48 A. 272 referred to.

G. Chandrasekhara Sastri for *G. Lakshmanna* for Appellant.

V. Viyyanna for Respondent.

B.V.V.

Jackson, J. C.M.S.A. No. 126 of 1930.
13th March, 1931.

Decree—Execution—Party against whom decree was passed, a lunatic—Application to set aside the decree as nullity—Executing Court, whether can go behind the decree—Practice.

In a suit by the plaintiff against the defendant a decree was passed in favour of the plaintiff and the properties belonging to the defendant were brought to sale in execution. The defendant's wife filed a petition in the executing Court that the execution was

not proper inasmuch as the Court had not jurisdiction as the defendant was a lunatic and remained unrepresented in the suit and that the decree was got *ex parte*. The Lower Appellate Court ordered further inquiry into the matter.

Held, that the executing Court cannot go behind the decree.

The question being really one of forum, it is not as though the aggrieved party had his remedy only in the Court of execution. In such matters of procedure it is highly advisable that the Court should follow an uniform practice.

44 Cal. 627 followed.

53 Cal. 166 at 173 and 4 Pat. L.J. 240 considered and explained.

38 Mad. 682 and A.I.R. 1926 Mad. 429 referred to.

The word "apparently" occurring in "where the decree presented for execution was made by a Court which apparently had not jurisdiction" on page 173 of 53 Cal. is only a third way of expressing the principle by the same metaphor, being synonymous with "on its face" and "without going behind".

R. Sundaralingam for Appellant.

M. Patanjali Sastri for Respondent.

K.C.

Reilly and Anantakrishna Aiyar, JJ. C.R.P. No. 1292 of 1928.
13th March, 1931.

Civil Procedure Code (*V of* 1908), *O.* 21, *R.* 89—*Third party purchaser—Deposit to set aside execution sale—Claim suit decreed in favour of person making deposit—Suit to recover amount paid into Court under protest—Contract Act,* 1872, *S.* 72.

Where subsequent to a private sale the property conveyed was attached and sold in execution of a decree obtained against the vendor and the third party purchaser paid into Court under protest the sale price and the deposit as required by O. 21, R. 89, Civil Procedure Code, and the claim suit of the purchaser having been ultimately decreed in his favour he sued the judgment-debtor for restoration of the amount he had paid into Court,

Held, without deciding whether the third party purchaser was a person interested within the meaning of O. 21, R. 89, that he was entitled to recover the sale price and the five per cent. deposit under S. 72 of the Contract Act.

12 M.I.A. 65, 7 C. 648, 15 C.L.J. 83, 40 Cal. 598 and 44 M.L.J. 325 referred to.

G. Chandrasekhara Sastri for *G. Lakshmanna* for Petitioner.

V. Viyyanna for Respondent.

B.V.V.

The Chief Justice, Ramesam, Reilly, Anantakrishna Aiyar and Sundaram Chetty, JJ. C.M.A. No. 274 of 1929.
9th March, 1931.

Civil Procedure Code—Ex parte *order in execution—Order falling under S.* 47—*O.* 9, *R.* 13, *if applies.*

O. 9, R. 13, Civil Procedure Code does not apply to orders in execution proceedings, even though such orders also fall within S. 47 of the Code and are deemed to be decrees by virtue of the definition of "decree" in S. 2. The words "summons," "defendant" and "suit" in R. 13 of O. 9 are all inappropriate to execution proceedings. The expression "treat" in S. 47 and "deemed" in S. 2 further indicate that the Code treats execution proceedings as different from suits.

37 Mad. 462 overruled.

50 M.L.J. 200 approved.

Observations in 52 Mad. 899 at 909 distinguished as *obiter.*

T. M. Krishnaswami Aiyar and *S. Subramania Aiyar* for Appellant.

N. Srinivasa Aiyangar for Respondent.

S.V.V.

Madhavan Nair, J. S.A. No. 2336 of 1927.
13*th March,* 1931.

Contract—Void contract—Suit to recover advance paid under —Restoration of benefit—Quantum meruit—*Contract Act,* 1872, *S.* 65.

Where a contract for the supply of labour was held to be invalid because of non-compliance with the rules framed under the Madras Planters Labour Act, 1903 and thereupon one of the parties to the contract sued to recover the advance paid under the invalid contract,

Held, that though the contract was void the suit claim was not for enforcement of the invalid contract but only for the restoration of the benefits passed thereunder, and the plaintiff was entitled to recover the advance both on the principle of the *quantum meruit* and under S. 65 of the Contract Act.

43 C. 827, 54 C. 189 and 53 M. 352 referred to.

8 A.C. 517 explained.

C. S. Venkatachariar and *C. S. Swaminathan* for Appellant.

B. Sitarama Rao for Respondent.

B.V.V.

Ramesam, J. S.A. No. 1957 of 1927.
16*th March*, 1931.

Evidence Act, S. 32—*Recital in a gift of a prior gift, if admissible*—De facto trustee *in management—Suit to recover trust property—Maintainability of.*

N.R.C.

In 1880 a widow executed a deed of gift in favour of her step-daughter *N* wherein she recited that her husband had made a gift of the properties to *N* at the time of her marriage and that she was executing a formal document in respect of the same pursuant to his directions.

Held, that *N* derived her title from the father and not from the widow and that the recital in the gift deed as to the prior gift by the father was admissible under S. 32, cl. (2) of the Evidence Act even as against the reversioner. Cases like I.L.R. 36 All. 187 dealing with the admissibility of recitals relating to necessity in widow's alienations distinguished.

N had dedicated her property to a trust by a deed wherein she appointed herself trustee for life and directed that her step-son *K* and his descendants should administer the trust after her lifetime. *K* died during *N's* lifetime and it was found that the plaintiff who will be the next reversioner to *N* had been appointed and was in fact managing the trust even during *N's* lifetime. In a suit by plaintiff to recover the trust properties from a person who denied the trust,

Held, (1) that it is doubtful if the widows of *K* could claim to be trustees on the ground that reference to *K's* descendants implied "heirs" generally as words of limitation,

(2) that as *K* had not accepted the appointment during his lifetime, he took no vested interest so as to preclude *N* from making any other appointment, and

(3) that in any event, as *K's* widows had taken no active steps to protect the trust but on the other hand seemed to support the adverse claim of the defendants, they could not be deemed to have accepted the trust and that the plaintiff was entitled to maintain this suit either on the footing of his appointment or as *de facto* trustee or at any rate as reversionary heir to *N*. Cases of *de facto* trustee's right to maintain actions to recover trust property referred to.

The Advocate-General (*A. Krishnaswami Aiyar*) and *R. Ramamurthi* for Appellant.

S. Varadachariar and *A. V. Visvanatha Sastri* for Respondent.

S.V.V.

Wallace and Stone, JJ. A.S. No. 167 of 1925.
18*th March*, 1931.

Procedure—Sale in execution of a decree—Variation of the decree to a small extent—Sale if void—Petition for restitution under S. 144 dismissed—Right of suit.

A decree was passed by the first Court for Rs. 7,695 and a sale was held in execution of that decree. On appeal the decree

was varied by the interest being reduced from 9 per cent. to 6 per cent. with the result that the decree amount finally was reduced to Rs. 7,495. A petition to set aside the sale in restitution under S. 144 was dismissed on the ground that the variation in the decree did not prejudice the judgment-debtor as the variation was only slight. The debtor thereupon filed a suit to set aside the sale.

Held, that whatever may be the case where the sale is void *ab initio,* he has no other right of action in cases such as this where the sale is not *ab initio* void.

Appellant in person.

The Advocate-General (A. Krishnaswami Aiyar), K. Umamaheswariah, Ch. Raghava Rao and *M. Venkatasubbiah* for Respondents.

S.V.V.

Curgenven and Cornish, JJ. A.S. Nos. 259 and 260 of 1929.
18th March, 1931.

Malabar Law—Karnavan's alienation—Suit by anandravan when subsequent Karnavan not disabled to sue—If and when maintainable.

An alienation by the prior Karnavan was sought to be set aside by the anandravans on the ground that the present Karnavan was inextricably mixed up with the transaction and could not sue to set it aside.

Held, that unless the Karnavan is disabled from suing to recover possession of the tarwad property, an anandravan cannot be allowed to sue on behalf of the tarwad.

32 M.L.J. 328; (1917) M.W.N. 342 and 43 M. 393 relied on.

The contention that the present Karnavan's laches and neglect to bring a suit justify the suit by the anandravan may be supported if it was shown to be a case of a Karnavan wilfully refusing to take the necessary proceedings to recover property in direct antagonism to the interests and wishes of the members of his tavazhi.

T. R. Venkatarama Sastri and *P. S. Narayanaswami Aiyar* for Appellant.

K. P. M. Menon, D. A. Krishna Variar and *P. S. Ramachandra Aiyar* for Respondents.

S.V.V.

Wallace and Stone, JJ. A.S. No. 438 of 1929.
18th March, 1931.

Documents—Non-production of, on the ground that there was nothing relevant in them—If justified.

It is not open to a party to refuse to produce accounts on the ground that they will not help the case. His duty is to produce them and leave it to the Court to say that they do not support the case. Otherwise an adverse inference may be drawn from their non-production.

M. Patanjali Sastri, V. Ramaswami Aiyar and *T. K. Subramaniam* for Appellants.

T. L. Venkatarama Aiyar for Respondent.

S.V.V.

Wallace and Stone, JJ. A.S. No. 123 of 1927.
18*th March*, 1931.

Evidence—Expert—Paid for by the defendant—If expert's evidence can be dismissed on that simple ground.

It is an unfounded insinuation to make that an expert is giving evidence for the defendant because he was paid a fee by the defendant. In other words, it means that his evidence is not his genuine opinion, but merely what the defendant has paid him to say. If expert evidence is to be thus so easily put on one side, Courts can better refuse once for all to examine them. If the manner in which the case stated to him was non-committal, it would be extremely convincing. But if in the way the case was stated to him, the opinion that the defendant wished to get from him was indicated, then it may lose some of its independant character.

C. S. Venkatachariar for *T. Rangachariar* and *V. N. Venkatavaradachariar* instructed by *Messrs. Short, Bewes & Co.* for Appellant.

The Advocate-General (*A. Krishnaswami Aiyar*), *A. C. Sampath Aiyangar* and *T. R. Srinivasa Aiyar* for Respondent.

S.V.V.

Venkatasubba Rao, J. S.A. No. 272 of 1928.
26th March, 1931.

Madras Estates Land Act, Ss. 135, 137, 142, *Sch. B, Art.* 21—*Amended Act IV of* 1909—*Tenants applying to District Collector for directions to landholder regarding repairs to agricultural tank—Order of District Collector in favour of tenants—Appeal by landholder against order of District Collector to District Court—Dismissal—Jurisdiction.*

Where tenants filed a petition before the District Collector to direct their landlord under S. 137 of the Estates Land Act to make repairs of an agricultural tank and the District Collector so directed, and the landlord appealed against the order to the District Court,

Held, that the District Court was justified in rejecting the appeal as there was no appeal from an order under S. 137 of the Madras Estates Land Act to the District Court, and only an appeal against that order lay to the Revenue Board under S. 142 of the Act.

Art. 21 of the Sch. B to the Act as amended by Act IV of 1909 contemplates a right in the landholder to apply for a review of the order of the District Collector under S. 137 for repairs, and only against the order passed by the District Collector in the review petition can an appeal lie to the District Court.

Opinion of Mr. V. Ramadoss on the point under S. 137 in his commentary to the Madras Estates Land Act approved.

S. Venkatesa Aiyangar for Appellant.

Y. Suryanarayana for Respondents.

K.C.

Waller and Madhavan Nair, JJ. L.P.A. No. 72 of 1926.
27th March, 1931.

Minor—Mortgage of minors' property by guardian—Joint and several decree against minors and guardian discharged—Extent of minors' liability—Individual liability of co-judgment-debtors—Absence of evidence—Presumption.

Where two divided brothers executed a promissory note and after the death of one of them a joint and several decree was obtained by the promisee against the surviving brother and the minor sons of the deceased, and thereupon the surviving brother effected a mortgage of the properties of the minors, had the deed executed in his individual capacity and as guardian of the minors and discharged the decree debt,

Held, in a suit upon the mortgage, that it was good only to the extent of the ultimate liability of the minors as between them and the guardian, and there being no evidence of such liability *inter se* the mortgage was binding on the minors to the extent of one-half of the decree debt.

3 Pat. L.J. 78 relied on.

Decision of Phillips, J., reported in 22 L.W. 466 affirmed.

N.R.C.

K. Sankara Sastri for Appellant.

V. N. Venkatavaradachari for Respondents.

B.V.V.

Ramesam, J. S.A. Nos. 1845 and 1846 of 1928.
31*st March*, 1931.

Madras Estates Land Act, S. 45—Suit for rent by Zamindar—In previous litigation by defendant his occupancy rights in land recognised, though his claim to Inam disallowed—Adverse possession—Defendant not a tenant of the zamindar in village—Whether defendant liable to pay rent.

A zamindar sued the defendant for rent due to him for lands which he claimed were belonging to him. In a previous litigation by the defendant for declaration of his lands as Inam lands, the High Court in second appeal held that they were not Inam lands but still the defendant possessed occupancy rights in them and remarked that he would be at liberty to set up a plea of adverse possession as a defence in other proceedings, if necessary. In the present suit the Lower Courts were of opinion that as the lands were originally Jeroyati lands the defendant was liable to pay rent.

Held, (1) that as the defendant was not even a tenant of the zamindar in the village, he acquired full title by adverse possession, and

(2) that the zamindar was not entitled to rent as he lost his title in the lands and S. 45 of the Estates Land Act could apply only to such cases where the trespasser of ryoti lands had not perfected his title by adverse possession.

Y. Suryanarayana for Appellant.

S. Venkatesa Aiyangar for Respondent.

K.C.

Reilly and Anantakrishna Aiyar, JJ. C.R.P. Nos. 1397 and 1613
31*st March*, 1931. of 1927.

Court Fees Act, 1870, *S.* 11—*Applicability—Administration suit—Passing of preliminary decree—Subsequent application by other creditors for proof of claims—Court-fee if payable—Nature of administration suit.*

Where in a suit for administration brought by a creditor the Court passed a preliminary decree and subsequently certain other creditors of the deceased applied to prove their claims,

Held, that those applications were not chargeable to Court-fee on the analogy of S. 11 of the Court Fees Act.

Observations to the contrary in 44 Cal. 819 not followed.

Nature of a suit for administration discussed.

Rule as to strict construction of fiscal enactments applied.

P. S. Narayanaswami Aiyar for Petitioners.

The Government Pleader (*P. Venkataramana Rao*) for the Government.

C. V. Harihara Aiyar and *T. S. Anantanarayana Aiyar* for Respondents.

B.V.V.

Madhavan Nair, J. S.A. No. 2291 of 1927.
23rd March, 1931.

Part-performance—Minor—Contract by guardian to sell—Vendee put in possession thereof—Suit by vendee for specific performance—Maintainability of.

A guardian of a minor agreed to sell the minor's property for proper purposes binding on the minor and put the vendee in possession thereof but no sale-deed was executed. The vendee paid off the debts as well. The guardian later executed another sale-deed in favour of a third person who was found not to be a purchaser for value without notice of the prior contract to sell. In a suit for specific performance by the first vendee,

Held, that the contract to sell was not specifically enforceable and part-performance did not improve the position in that respect.

N. Rama Rao for Appellant.

S. Varadachariar and *V. Pattabhirama Sastri* for Respondent.

S.V.V.

Krishnan Pandalai, J. C.R.P. Nos. 1364 and 1365 of 1929.
24th March, 1931.

Madras Estates Land Act, 1908, *Ss.* 189 *and* 213—*Suit to recover money unlawfully collected as rent with interest—Maintainability in Civil Court—Contract Act,* 1872, *S. 72—Suit falling under, whether one for damages—Rent sale—Setting aside by tenant—Suit to recover amount paid in excess of rent due—Forum.*

A suit for the refund of money unlawfully collected as rent by the abuse of the process provided for by the Madras Estates Land Act, 1908, whether described as an action for money had and received or to enforce the obligation created by S. 72 of the Contract Act, is still one for damages within the meaning of S. 213 of the Madras Estates Land Act and is not maintainable in the Civil Court.

39 M. 219 referred to.

A claim for interest by way of damages on the amount illegally recovered by the landlord, though it is in respect of the unlawful detention of the money, is still a claim for damages arising out of the abuse of the process of the Court and attracts the prohibition of Ss. 189 and 213 of the Act.

A suit brought by a tenant to recover the amount paid into Court over and above the lawful rent in order to have a rent-sale set aside is maintainable only in the Revenue Court.

T. R. Venkatarama Sastri and *T. B. Balagopal* for Petitioners.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondents.

B.V.V.

N.R.C.

The Chief Justice and Sundaram Chetty, J.
26th March, 1931.

Cr. M.P. No. 175 of 1931.

Criminal Procedure Code (*V of* 1898), *S.* 493—*Minor in custody of Court guardian—Application by mother for appointment as guardian refused—Application for* Habeas Corpus—*Sustainability—Removal of guardian as sole remedy—Guardian and Wards Act,* 1890, *Ss.* 25 *and* 39.

The illegitimate mother of a male child applied to the Chittoor District Court to be appointed guardian of the child, then in the custody of the putative father. The application was dismissed by the Lower Court and confirmed by the High Court on appeal on the ground that she was not resident in British Indian territory. The father, however, had expressed his willingness to be appointed guardian and he was so appointed by an order of the Lower Court. The mother thereupon filed an application in the High Court for a writ of *habeas corpus.*

Held, that the application was misconceived in view of the fact that the father had been appointed guardian by Court.

Held further, that a petition under S. 25 of the Guardian and Wards Act for the custody of the child was not maintainable because the child was in the lawful keeping of the guardian. The only course open to the mother under the circumstances was to apply under S. 39 of the Act for removal of the guardian.

K. Rajah Aiyar, V. Ramaswami Aiyar and *S. Narasinga Rao* for Petitioner.

S. Varadachariar, R. Rajagopala Aiyangar and *S. V. Venugopalachariar* for Respondent.

B.V.V.

Wallace and Stone, JJ.
2nd April, 1931.

Appeal No. 342 of 1925.

Evidence Act, S. 112—*Legitimacy*—*Presumption of*—*Rebuttal*—*Non-access*—*Proof of*—*Evidence of wife*—*Relevant, how far.*

Where a husband and wife were living apart for several years before the birth of the child and the wife was leading an unchaste life and she herself made several statements that the child was born to another person,

Held, that, there was sufficient proof of non-access as it was not necessary, in fact it was not possible, for a party to prove a negative by a positive evidence.

It is plain that S. 112 of the Evidence Act lays a heavy burden of proving or showing non-access, but such proof is not different from any other species of proof under the Evidence Act, namely, when after considering the matters before it, the Court either believes that there was non-access or considers its existence so

probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists (*see* S. 3 of the Evidence Act).

There is nothing contrary to law in the mother herself giving evidence on a point of this kind since it is not the law in this country that a wife is not a competent witness as to access or non-access by her husband.

25 M.L.J. 594 and 18 B. 468 followed.

K. V. Krishnaswami Aiyar and *R. Ramasubba Aiyar* for Appellants.

K. Rajah Aiyar and *S. Venkatesa Aiyangar* for Respondent.

K.C.

Jackson, J. C.R.P. No. 1636 of 1930.
8th April, 1931.

Civil Procedure Code (*V of* 1908), *O.* 6, *R.* 17—*Amendment—New case by amendment—If permissible.*

Where a suit was filed for possession alleging a partition between the plaintiff and the defendants about 31 years ago and a lease to the defendants of the suit properties as having fallen to the plaintiff's share, the defence was a denial of partition and a claim to the properties in their own right. The plaintiff thereupon sought to amend the plaint by including a prayer for amendment.

Held, an amendment cannot be allowed when it displaces the original case in the plaint and sets up a new case. A suit for ejectment cannot be converted into a suit for partition.

37 Mad. 529 followed.

K. Kuppuswami for Petitioner.

K. Umamaheswaran for Respondent.

S.V.V.

Sundaram Chetty, J. C.R.P. No. 109 of 1931.
8th April, 1931.

Court Fees Act (*VII of* 1870), *Sch. I, Art.* 1—*Set-off—Equitable set-off—Court-fee payable—Suit on promissory note—Defendant's claim for damages—Nature of set-off—Civil Procedure Code,* 1908, *O.* 8, *R.* 6.

The defendant had executed a promissory note to the plaintiff's assignor for the value of a motor-car he had purchased from the latter. In a suit on the promissory note the defendant pleaded that a certain amount was due to him by way of damages in respect of the breach of certain covenants in the sale. A question having been raised as to the Court-fee payable on the defendant's claim,

Held, that the defendant's claim can be said to be a legal set-off within the meaning of O. 8, R. 6, Civil Procedure Code.

Held further, that even if it should be treated as an equitable set-off, the defendant was bound to pay Court-fee on the value of his claim under Art. 1 of Sch. I of the Court Fees Act because there is nothing to show that set-off in that Article is confined to legal set-off as defined in O. 8, R. 6 of the Code.

17 M. L. J. 481 and I.L.R. 38 Bom. 631 distinguished as cases decided prior to the amendment of Art. 1 by the Civil Procedure Code, 1908.

V. Balasundaram Aiyar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

B.V.V.

Ramesam, J. — S. A. No. 388 of 1928.

9th April, 1931.

Mortgage—Covenant—Possession in lieu of interest—Steps not taken to get possession—Claim for damages in the shape of mesne profits—Limitation.

Where under a covenant in a mortgage bond the mortgagee should enjoy the property in lieu of interest but he did not take steps to get delivery of possession from the mortgagor and claimed damages in the shape of mesne profits for three years and where the lower courts found the document supported by consideration to the extent of three-fourths of the entire amount of the bond but dismissed the suit on the ground that the claim for possession was barred and hence mesne profits were also barred,

Held (*i*) that it was unjustified to say that if a mortgagor failed to deliver possession to the mortgagee in breach of the covenant in the document, the mortgagee would lose his right to interest merely because the mortgagee had not taken any immediate steps to enforce possession.

17 Mad. 469; 46 Cal. 448 and S.A. No. 1199 of 1927 followed.

17 Bom. 425 and 45 Bom. 523 dissented from.

A claim for damages remains unbarred so long as the claim for the principal is also unbarred.

19 All. 39 (P.C.) and 20 Mad. 371 applied.

(*ii*) that the plaintiff was not entitled to get larger or very exorbitant rate of interest under the guise of a claim for mesne profits especially as he did not even care to have the rate mentioned in the mortgage bond (as in the case of 46 Cal. 448).

C. S. Venkatachariar and *Salem Ramaswami Aiyar* for Appellant.

C. A. Seshagiri Sastri for Respondent.

K.C.

Ramesam and Stone, JJ. O.S.A. No. 95 of 1929, etc.
1*st April*, 1931.

Partition—Construction of partition award—Reunion if restores joint family status or only introduces a rule of preferential succession—Deceased partner's lien over partnership property—Nature of—If extends over specific items of partnership property—Minor—Admission to benefits of partnership—Meaning of.

At the instance of three of five brothers, it was referred to arbitrators to divide the family property between the brothers and the arbitrator passed an award allotting to each brother a one-fifth share. In so dividing, properties were allotted to two of the brothers in undivided shares and a yarn business which was the important asset of the family was similarly allotted to the said two at a valuation. The business was continued by them under the old name and style.

Held, where a document is unambiguous, no evidence of subsequent conduct can be let in to prove the intention of the parties to the partition deed but where it is ambiguous and capable of two constructions, such evidence can be let in to find out the sense in which the parties used the words. But where as here the document showed that the two brothers had an idea of joining together, the subsequent conduct is evidence to find that they so joined and continued as a joint family. The rule excluding evidence of conduct cannot be applied with rigour to the construction of an award which is not a deed of parties or against third parties (creditors). There can be a partial partition of person and property and the family remains joint *quoad* the property not divided.

Reunion restores the joint family status and does not merely introduce a rule of preferential succession.

Where a surviving partner uses the partnership assets in trade and alienates them, the representative of the deceased partner has no lien on the specific items of partnership property for the share of the assets due to him. His claim is only to have it paid out of the surplus assets of the partnership after ascertainment. The surviving partner is the legal owner of the properties and can convey a good title to purchasers from him, unless possibly where the transferee has notice that the deceased partner's claims have not been satisfied.

Where the representative of the deceased partner is a minor and the surviving partner admitted him to the benefits of the partnership business continued by him and used the share of the deceased partner in the firm as the minor's share of the partnership capital, the minor is liable under S. 247, Contract Act, to the extent of that share in the business.

55 M.L.J. 132 and 57 M.L.J. 404 reversed.

N.R.C.

Sir C. P. Ramaswami Aiyar, C. Krishnaswami, Advocate-General, M. Subbaroya Aiyar, P. Kameswara Rao, S. Srinivasa Aiyangar, T. L. Venkatarama Aiyar, O. T. Govindan Nambiar and *R. N. Aiyangar* for Appellants.

S. Varadachariar, S. Duraiswami Aiyar and *V. Balaraman* for Respondents.

S.V.V.

Curgenven and Cornish, JJ. Appeal No. 329 of 1925.
16th April, 1931.

Provincial Insolvency Act (III of 1907), *S.* 34—*Execution sale completed after the filing of insolvency petition but before adjudication—Right of the Official Receiver to the property sold—Order of annulment under S.* 37 *as fraudulent preference—Effect of—Mortgage suit—Interest from date of suit to date fixed for payment—If discretionary—Rate of—Proposed sale by Official Receiver of certain property as the insolvent's property objection to by a claimant—No enquiry but property sold at the sole risk of the purchaser—Whether order conclusive against claimant.*

An execution sale of the property of an insolvent completed after the presentation of an insolvency petition but before the order of adjudication has been passed, is protected under the provisions of S. 34 (1) of the Provincial Insolvency Act (III of 1907) and the property so sold does not vest in the Official Receiver on adjudication.

42 All. 336 followed.

Though the annulment of a transfer under S. 37 as a fraudulent preference is conclusive of the property having vested in the Official Receiver, still the annulment will not have the effect of depriving any other person of a title which is protected by the Act.

(1899) 1 Q.B. 622 referred to.

In mortgage suits, the mortgagee is entitled as of right to interest at the contract rate till the date fixed for payment.

A.I.R. 1927 P.C. 1 and 34 C. 150 followed.

Where a claimant objects to the proposed sale of certain property by the Official Receiver and the Insolvency Court, without enquiring into the alleged title of the claimant, merely directs the sale of the right, title and interest of the insolvent at the sole risk of the purchaser, there is no order which can be said to be binding and conclusive as against the claimant.

K. Rajah Aiyar and *K. S. Rajagopalachari* for Appellant.

R. Rajagopala Aiyangar for Respondent.

S.V.V.

Jackson, J. C.R.P. No. 1281 of 1930.
9th April, 1931.

Court Fees Act (*VII of* 1870), *S.* 17—*Deposit of sums of money on different dates—Suit to recover several deposits—Issue of single notice of demand—Effect—Court-fee payable as on "distinct subjects".*

Where different sums of money were deposited by the plaintiff in the defendant's firm on three different dates the rate of interest being the same, and a single notice of demand having been made for the repayment of the deposit, the suit was framed as one for an account of the several deposits,

Held, that Court-fee was payable on the several sums as on distinct subjects and not on their aggregate value; each deposit is a distinct subject within the meaning of Section 17 of the Court Fees Act because different suits could have been brought on each of the deposits, O 2, R. 2, Civil Procedure Code, not being a bar to such a course. In such a case, demand is not necessary to give a cause of action for the recovery of the amount and therefore the fact that a single notice was given is immaterial.

9 All. 452 followed.

46 Bom. 142 referred to.

A.I.R. 1924 Patna 596 distinguished as being a case where demand was necessary to give a cause of action.

K. S. Krishnaswami Aiyangar and *S. Ramaswami Aiyangar* for Petitioner.

S. Varadachariar and *S. V. Venugopalachariar* for Respondent.

B.V.V.

The Chief Justice, Sundaram Chetty and Stone, JJ. O.P. No. 63 of 1930.
16th April, 1931.

Income-tax Act (*XI of* 1922), *Ss.* 48 *to* 50 *and* 66 (1)—*Review proceedings before Commissioner of Income-tax—Application to have case stated—Refusal—Application for mandamus—Sustainability—Right to refund—Specific Relief Act,* 1877, *S.* 45.

Where in proceedings started by the Commissioner of Income-tax the order of the Assistant Commissioner which was in favour of the assessee was set aside and the assessee's application to the Commissioner for stating a case to the High Court was refused,

Held, that the High Court had jurisdiction to entertain an application by the assessee under S. 45 of the Specific Relief Act for a mandamus directing the Commissioner of Income-tax to state a case.

49 Mad. 725 (F.B.) relied on.

N.R.C.

Held, further, that an assessee is not entitled to claim a refund apart from the provisions of Ss. 48 to 50 of the Income-tax Act.

V. Rajagopala Aiyar and *T. V. Ramiah* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

B.V.V.

The Chief Justice, Sundaram Chetty and Stone, JJ. — O.P. No. 160 of 1930.

16th April, 1931.

Income-tax Act (XI of 1922), *Ss.* 13 *and* 66—*Money-lending business—Payments by debtor—Appropriation towards principal or interest—Order of Income-tax Officer regarding same—Reference—Question of law.*

An assessee carrying on a money-lending business received a sum of money in the year of account from his debtor and instead of appropriating the same either towards the principal or for interest kept it in suspense account and contended that the appropriation should be made only when the accounts were finally adjusted. Though the amount paid exceeded the interest that had become payable the Income-tax authorities proceeded with the assessment on the footing that the payment should be appropriated towards interest.

Held, that the Income-tax authorities had in such a case merely exercised a discretion vested in them under S. 13 of the Income-tax Act and that no question of law arose for decision.

V. Rajagopala Aiyar and *T. V. Ramiah* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

B.V.V.

Jackson, J. — Cr.R.C. No. 809 of 1930.

16th April, 1931.

Criminal Procedure Code (V of 1898), *S.* 144 (4)—Ex parte *order passed by Magistrate—Petition to rescind—Dismissal—Order not containing reasons—Validity.*

An order dismissing a petition under S. 144 (4), Criminal Procedure Code, to rescind or modify an order passed *ex parte* by the Magistrate, is illegal if it does not contain reasons for the dismissal.

T. V. Ramiah for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

The Public Prosecutor (*L. H. Bewes*) for the Crown.

B.V.V.

Reilly and Anantakrishna Aiyar, JJ. C.M.A. No. 304 of 1927.
20th April, 1931.

*Will—Application for probate—*Onus probandi*—Nature of evidence to be given.*

In applications for probate the *onus probandi* is always on the person who propounds a will and it is discharged only by proof that the document which is the subject-matter of the proceeding is the last will of a competent testator.

Per Reilly, J.—The rule stated in *Ram Gopal Lal* v. *Ajpna Kunwar,* (1922) I.L.R. 44 All. 495 (P.C.), does not mean that the plaintiff should prove that there must be no suspicion but only that he must give thoroughly good evidence to prove that it is the last will of a competent testator.

Per Anantakrishna Aiyar, J.—Courts of first instance ought not to deal with contested probate proceedings as ordinary cases having regard to the high probative value attached to the decisions thereon. They should take special care to see that direct evidence of material witnesses are produced in such cases.

T R. Ramachandra Aiyar and *V. Raghavachariar* for Appellant.

The Advocate-General (*A. Krishnaswami Aiyar*) and *T. E. Ramabhadrachariar* for Respondent.

B.V.V.

Venkatasubba Rao, J. S.A. No. 368 of 1928.
21st April, 1931.

Evidence Act, S. 112*—Access—Meaning of—Whether opportunity of access enough—Judicial separation—If recognised in Hindu Law—Effect of living separate.*

A husband and wife separated and were living separately from 1881 in two neighbouring villages. Children were born to the wife in 1891 and 1898. The husband soon after married a second wife and some years later a third wife. The first wife was discarded on suspicion of immorality. The Subordinate Judge had found that there was no sexual intercourse between the husband and the wife at all material times but there were opportunities for access.

Held, "access" in S. 112 means "sexual intercourse" and not mere opportunity of access to the woman. Judicial separation is not recognised in Hindu Law. The English cases like 12 Probate 112 laying down that the presumption of legitimacy is rebutted after judicial separation go too far under the Indian Law where under S. 112 non-access has got to be proved as a fact. There is yet a presumption of legitimacy but that presumption will be very slight when it is proved that the spouses had separated.

Morris v. *Davies,* 5 Cl. and F. 163, followed.

Case-law discussed.

T. M. Krishnaswami Aiyar and *B. C. Seshachala Aiyar* for Appellants.

S. Varadachariar, A. S. Sivakaminathan and *C. Gopalan* for Respondents.

S.V.V.

Anantakrishna Aiyar, J. C.R.P. Nos. 1774 and 1775 of 1930.
24th April, 1931.

Civil Procedure Code, S. 49 *and O.* 21, *Rr.* 16 *and* 18—*Assignment subject to equities—Notice of equities if necessary—Cross decrees—Execution of—Set off when claimable—Failure to plead the right to set off in a prior execution petition—If a bar to a plea in a later execution petition—Both decrees not in the same Court on the date of the prior execution petition.*

A and *B* obtained cross decrees in the same Court in two separate suits. *B* got his decree transmitted to another Court for execution. *A* applied for execution of his decree at that stage in the Court which passed the decree but did not ask for a set off. *B* then assigned his decree and the assignee applied to the Court which passed the decree to recognise the assignment. *A* then put in another execution petition claiming set off of *B's* decree against his. *A's* was the larger decree. The assignee contended (*i*) that the set off cannot be allowed to be pleaded as it was not pleaded in the prior execution petition, and (*ii*) that he was an assignee without notice of the cross decree and therefore it was not subject to equities and cannot be enforced under O. 21, R. 18.

Held, (*i*) that no set off can be allowed unless both the decrees are pending for execution in the same Court.

32 Mad. 336 followed.

A.I.R. 1930 Lah. 508 distinguished.

(*ii*) an assignee of a decree even without notice of the existence of the cross decree against his assignor is subject to the equities available to the holder of the cross decree.

2 C.L.J. 312 followed.

(*iii*) the failure to raise the plea in the prior execution petition was not a bar to raising it in the next, as then the cross decree was not in this Court but transmitted to another Court.

D. Ramaswami Aiyangar for Petitioner.

K. Saminathan for *A. V. Visvanatha Sastri* for Respondent.

S.V.V.

[END OF VOL. LX.]